87 No. 1814

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
Petitioner,

v.

COLUMBIA PICTURES INDUSTRIES, INC., *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

Section 111 of the Copyright Act of 1976, 17 U.S.C. § 111 (1982 & Supp. IV 1986), establishes a compulsory copyright license for cable television's retransmission of broadcast programming. The District of Columbia Circuit, reversing the District Court, deferred to the Copyright Office and upheld an interpretation of Section 111 that requires cable operators to include revenues derived from non-broadcast programming—for which cable operators pay the copyright holders directly—in calculating their compulsory royalty fee.

The questions presented are:

1. Whether the court below erred in concluding, contrary to the Second Circuit, that the Copyright Office, an arm of Congress with an acknowledged institutional bias, is entitled to judicial deference in interpreting substantive provisions of the Copyright Act.

2. Whether the court below erred in concluding that Section 111 requires cable operators computing copyright royalties due to the owners of broadcast programming to include revenue derived from non-broadcast services.

LIST OF PARTIES

Petitioner in this Court, and Appellee in the D.C. Circuit, is the National Cable Television Association, Inc.* Respondents in this Court, and Appellants in the D.C. Circuit, are Columbia Pictures Industries, Inc., Embassy Communications, MGM/UA Communications Co., Orion Pictures Corporation, Paramount Pictures Corporation, Turner Entertainment Company, Twentieth Century Fox Film Corporation, Universal Pictures, A Division of Universal City Studios, Inc., Warner Bros., Inc., the Motion Picture Association of America, Inc., the United States Copyright Office and its Register.

Cablevision Company appeared in consolidated cases below as appellant/cross appellee.

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* National Cable Television Association, Inc. is a non-profit trade association primarily of cable television operators, with associate membership of programmers and suppliers. It considers its membership list proprietary and confidential, but will endeavor to provide a list of members under seal upon request of this Court.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner National Cable Television Association, Inc. ("NCTA") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in *Cablevision Systems Development Co.* v. *Motion Picture Association of America, Inc., et al.*, on January 5, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 836 F.2d 599 and is reprinted in the appendix hereto ("App.") at 1a.

The opinion of the District Court is reported at 641 F. Supp. 1154 and is reprinted at App. 36a.

JURISDICTION

NCTA's action in the District Court arose under 28 U.S.C. §§ 1338, 2201, and 2202(a). Review by the D.C. Circuit was sought pursuant to 28 U.S.C. § 1291. The decision for the D.C. Circuit was filed on January 5, 1988. On March 22, 1988, the Chief Justice granted an Order extending NCTA's time to file this petition until May 4, 1988. The jurisdiction of this Court to review the judgment of the D.C. Circuit arises under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The relevant portions of the Copyright Act, 17 U.S.C. § 111(d)(1) (Supp. IV 1986), and of the Copyright Office regulations, 37 C.F.R. § 201.17(b)(1) (1987), are reprinted in the Appendix hereto, at App. 59a-62a.

STATEMENT OF THE CASE

The Copyright Act of 1976 established a compulsory copyright license for cable television's retransmission of broadcast signals.[1] Section 111 of the Act, 17 U.S.C. § 111 (1982 & Supp. IV 1986), App. 59a, imposed liability on cable operators for the "secondary transmission" of broadcast signals and provided a statutory mechanism to calculate royalty obligations. Over half of American television households now receive their broadcast programming through operation

[1] The compulsory copyright license was adopted in direct response to this Court's rulings allowing cable systems to retransmit broadcast signals without incurring copyright liability. *See Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U.S. 390 (1968) (a cable system "no more than enhances the viewer's capacity to receive the broadcaster's signals"); *Teleprompter Corp.* v. *CBS, Inc.*, 415 U.S. 394 (1974).

of this license. The resulting royalty fees for 1987, collected from more than 10,000 separate cable systems, exceeded $100 million.[2]

The statutory royalty mechanism, with its detailed computational formula, was designed so that cable operators would not be forced to negotiate privately with the myriad copyright owners of broadcast programming. Section 111(d)(1)(B) provides that the compulsory royalty payment shall be "computed on the basis of specified percentages of the gross receipts . . . for the basic service of providing secondary transmission of primary broadcast transmitters." App. 60a. The more revenue a cable system generates from its carriage of broadcast signals, the greater the operator's compulsory copyright fee.[3]

Section 111 does not address cable's delivery of non-broadcast, or "cablecast," programming. At the time the Copyright Act was adopted, cablecast programming was of little significance, and cable television operators were dependent almost entirely upon retransmitting broadcast signals. Through the advent of satellite technology, cablecast programming has since expanded so that it now frequently occupies more channels on a cable system than does broadcast programming. Cablecast programming, which today includes such popular services as Cable News Network, C-Span, and ESPN, have always been privately purchased from the copyright owners for distribution over cable systems.

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[2] 8 Communications Daily No. 44, at 3 (March 7, 1988).

[3] Royalties paid to the government under Section 111 are ultimately distributed to individual copyright owners by the Copyright Royalty Tribunal.

The underlying controversy in this case concerns how compulsory copyright fees should be computed when broadcast programming (which is covered by the compulsory license) is offered together with cablecast programming (which is not covered). The House Report accompanying the 1976 Copyright Act stated that, in calculating royalty payments, "only receipts for the basic service of providing secondary transmission of primary broadcast transmitters are to be considered. Other receipts from subscribers, such as those for pay cable services or installation charges, are not included in gross receipts."[4]

In September 1983, NCTA, as the principal trade association for the nation's cable television operators, filed a complaint in the United States District Court for the District of Columbia against the Motion Picture Association of America, Inc. ("MPAA") and its member companies seeking a declaratory ruling interpreting Section 111.[5] The District Court later ordered that NCTA join the Copyright Office as a codefendant, and the court ultimately consolidated NCTA's case with on-going cases involving an individual cable operator, Cablevision Company, and MPAA.[6] It was while these cases were pending before

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[4] H.R. Rep. No. 1476, 94th Cong., 2d Sess. 1, 96 (1976), *reprinted in* 1976 U.S. Code Cong. & Admin. News 5659, 5710-11.

[5] MPAA's member companies receive the largest share of the fees paid under the compulsory copyright license.

[6] Cablevision espouses a different interpretation of Section 111 than that offered by either NCTA, MPAA, or the Copyright Office. Cablevision filed a petition for writ of certiorari on April 4, 1988, No. 87-1642. These separate petitions from the same judgment should be considered together.

the District Court that the Copyright Office, for the first time, clearly addressed in regulations and other writings how to compute the compulsory copyright payment where valuable non-broadcast and broadcast signals are combined on a single tier for one price.

At that time, the Copyright Office indicated that where the cablecast programming is "offered in combination with secondary transmission [broadcast] service for a single fee," all revenues must be included in the computation. 37 C.F.R. § 201.17(b)(1) (1987). The Copyright Office offered the following explanation:

> Whenever the two types of services [i.e., broadcast and nonbroadcast] are offered for a single price or, if on separate tiers, whenever it is necessary to subscribe to one tier in order to receive another, the two services are in reality being offered as a single package of service; if secondary transmissions are included in the package, gross receipts from both tiers of the combined package must be reported and used in calculating copyright royalties.[7]

In promulgating the regulation, the Copyright Office noted that it could not "decide the matter finally since definitive interpretation of a statute is the province of the courts." 49 Fed. Reg. 13029, 13031 (1984). The Office went on expressly to "welcome the guidance of the courts." *Id.*

Under the Copyright Office's interpretation, if a cable operator offers ten channels of broadcast pro-

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[7] Letter from Dorothy Schrader, Copyright Office General Counsel, to David J. Saylor, June 9, 1986, at 2.

gramming for $5 and ten channels of cablecast programming for another $7, the compulsory copyright fee would be based solely on the $5 broadcast tier. If the operator instead offers a single twenty channel package, consisting of the same broadcast and cablecast programming, for $12, all $12 must be included in the fee calculation.

The District Court held for NCTA and struck down the Copyright Office's new regulations. It noted that "the mere inclusion of nonbroadcast signals on the same tier with broadcast signals does not magically transform the nonbroadcast signals into signals now subject to the compulsory licensing scheme. They remain outside the licensing scheme and any revenues attributable to them should not be included in the calculation of 'gross receipts.' " App. 51a. The court concluded that "the Copyright Office's definition of 'gross receipts' does not have a reasonable basis in law and frustrates the underlying congressional policy." *Id.* at 48a.

The Court of Appeals reversed the District Court and sustained the regulations. Finding the statute "silent or ambiguous," the court felt obliged to defer to the interpretation offered by the Copyright Office. "Congress saw a need for continuing interpretation of Section 111," the court concluded, "and thereby gave the Copyright Office statutory authority to fill that role. Its interpretations are therefore due the same deference given those of *any other agency.*" *Id.* at 21a (emphasis added).

REASONS FOR GRANTING THE WRIT

The decision below dramatically increases the amount of copyright fees that cable television oper-

ators must pay to broadcasters and other copyright holders. The rates have soared 140 percent in the short time since the Court of Appeals decision issued in January 1987.[8] The increase will translate literally to hundreds of millions of dollars and will affect far more than the profitability of cable operators. The decision also will adversely affect the nation's cable subscribers. Indeed, cable operators are now being forced to reevaluate existing marketing practices. Broadcast signals may be excluded from popular programming packages or deleted altogether. On the other hand, cable operators will be penalized for offering packages with more cablecast programming, since that programming now bears a "double" copyright payment. This case will affect the media landscape throughout the country for program producers, cable operators, artists and, ultimately, consumers.

Even beyond the implications of this particular interpretation of the Act, the decision below is significant in granting unprecedented authority to the Copyright Office. By deferring to that Office in this private dispute between the owners and users of copyrighted material, the Court of Appeals bestowed powers on the Office never envisioned by Congress. The decision to do so conflicts directly with Second Circuit precedent limiting the Office's interpretative authority. Under the Copyright Act, the Copyright Office is the depository of compulsory copyright payments. Whether cable operators have properly com-

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[8] For the first half of 1987, prior to the appellate decision, cable operators paid $32.1 million in compulsory copyright fees. Payments for the second half of 1987, which were due after the appellate decision was issued, soared to $76.8 million. 8 Communications Daily No. 44, at 3 (March 7, 1988).

puted their compulsory copyright fees is a matter to be determined in the first instance by the courts in an infringement action.[9] The Copyright Office has no role in disputes between owners and users of copyrighted materials as to the *amounts* owed under the compulsory license.

The breadth of the ruling of the court below promises to be especially damaging to the congressional copyright scheme because of the institutional tendency of the Copyright Office to favor copyright owners. The Office was established to serve the interests of the copyright holders, and the Register of Copyrights has clearly recognized this duty.[10] The inevitable consequence of the court's holding that the Office's interpretations are entitled to deference will be a tilting of Congress' careful copyright balance toward the copyright holders in a manner not intended in the Copyright Act. Already the Copyright Office has been importuned by MPAA to flex its new muscles in favor of the copyright holders.[11] And in a Notice of Inquiry released just weeks after the Court of Appeals decision, the Office suggested a willingness to make certain determinations regarding broadcast signals which heretofore were the exclusive province of the Federal Communications Commission. 53 Fed. Reg. 5591 (1988).

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[9] See pages 10-14, *infra*.

[10] See pages 15-18, *infra*.

[11] On February 12, 1988, MPAA submitted a petition requesting the Copyright Office to impose interest charges, nowhere mentioned in the Copyright Act, on cable operators for late payments. The Copyright Office has not yet ruled on the petition.

Not only is this development contrary to Congress' evident intent, but a ruling that Congress delegated broad interpretive authority to the Copyright Office of the Library of Congress—as issued by the court below—is inconsistent with the separation of powers doctrine. The Copyright Office is part of the legislative branch of government. Accordingly, constitutionally imposed restrictions on the functions of the legislative branch unequivocally preclude the treatment of the Copyright Office as "any other agency."

I. THE COURT BELOW ERRED IN DEFERRING TO THE COPYRIGHT OFFICE TO RESOLVE A CONTROVERSY OVER WHICH THE OFFICE HAS NO STATUTORY AUTHORITY.

In a series of important cases beginning with the *Chevron* case in 1984,[12] this Court has endeavored to set forth the basic principles for reviewing statutory interpretations by administrative agencies.[13] Although *Chevron* and its progeny mandate deference to administrative agencies in certain circumstances, this Court has never suggested that deference is due to an agency operating outside its lawful authority.[14] The court below overlooked this fundamental limitation, and applied *Chevron* to the Copyright Office's inter-

[12] *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

[13] *See, e.g., INS* v. *Cardoza-Fonseca*, 107 S. Ct. 1207 (1987); *NLRB* v. *United Food and Commercial Workers Union, Local 23*, 108 S. Ct. 413 (1987).

[14] *Chevron*, 467 U.S. at 842-45. *See also National Treasury Employees Union* v. *FLRA*, 810 F.2d 295, 297 (D.C. Cir. 1987) (deference will not be accorded unless "agency's interpretation falls within the scope of authority that has been properly delegated by Congress to the agency").

pretation of Section 111. App. 16a-21a. It failed to appreciate that the Office's ministerial charge under the Copyright Act did not convey with it a concomitant responsibility to make statutory interpretations affecting the substantive rights of private parties. The court applied *Chevron* because it erroneously assumed that the Copyright Office was "an agency to which Congress has delegated policy-making responsibilities." App. 19a. By ignoring the special characteristics of the "agency" at issue and deferring to the Copyright Office, the District of Columbia Circuit stretched the *Chevron* doctrine beyond recognition.

A. The Decision Below Granting the Copyright Office Deference in Interpreting Section 111 Contradicts Established Law in the Second Circuit and Has No Statutory Support.

The decision of the court below to defer to the Copyright Office's statutory interpretation conflicts directly with the Second Circuit's decision in *Bartok* v. *Boosey & Hawkes, Inc.*, 523 F.2d 941 (1975). At issue in *Bartok* was whether a particular composition should be treated as "posthumous" work under the Copyright Act. The Second Circuit flatly refused to give weight to the Copyright Office's definition of the statutory term. "[T]he Copyright Office has no authority to give opinions or define legal terms and its interpretation on an issue never before decided should not be given controlling weight." *Id.* at 946-47.

The court below summarily dismissed *Bartok*'s treatment of the Copyright Office as dictum and irrelevant to disputes arising under Section 111. App. 21a. But resolution of the deference issue in *Bartok* was critical to that court's construction of the undefined statutory term. Moreover, the court below

failed to explain why Congress ascribed a larger role to the Copyright Office in interpreting Section 111 than in interpreting other provisions of the Copyright Act. Notwithstanding the efforts of the court below, its decision cannot be reconciled with the decision in *Bartok*. Unless this Court addresses the issue, this split among the circuits will create confusion as to the proper role of the Copyright Office in administering the Copyright Act.

The decision in *Bartok* was based, in part, on the Copyright Office's own regulations, which stated that "[t]he Copyright Office . . . does not . . . give legal opinions or advice on such matters as . . . [t]he sufficiency, extent or scope of compliance, with the copyright law." 37 C.F.R. § 201.2(a)(1) (1975)(amended 1985). And the Copyright Office has, in other contexts, acknowledged the limited scope of its authority. It has readily admitted that active enforcement of the statute "would be beyond [its] statutory authority" and emphasized that "[t]he principal obligation for enforcement of violations of Section 111 rests with the affected copyright owners, not the Copyright Office." 45 Fed. Reg. 45270, 45271 (1980).[15] Counsel for the Copyright Office explained to the District Court: "By statute and by its own practice, the Copyright

[15] The Office in the past has expressed concern that cable systems might reject the Office's statutory interpretation, but concluded "that the only remedy lies with the copyright owners themselves, who may decide to bring civil infringement actions for violation of the compulsory license." 49 Fed. Reg. 14944, 14948 (1984). *See also* 37 C.F.R. § 201.17(c)(2) (1987) (final processing by the Copyright Office "shall in no case be considered a determination that . . . requirements to qualify for a compulsory license have been satisfied").

Office says, we are not the S.E.C., we are not the F.C.C.; we do not go out and affirmatively say to the copyright owners or the cable operators you shall do this, you shall not do that."[16] In adopting the very regulation contested here, the Copyright Office expressly invited judicial resolution of the issue. 49 Fed. Reg. 13029, 13031 (1984).

As previously recognized by both the Second Circuit and the Copyright Office, the latter has no role in making substantive interpretations governing the scope of compliance with copyright laws. The Office's authority, with respect to Section 111, is restricted to the procedural matters of gathering identifying information, revenue data, and royalty payments. 17 U.S.C. §§ 111(d)(1), 111(d)(2), (Supp. IV 1986); App. 59a-61a.[17] Although Section 111 describes in detail the Office's authority as a depository to design and collect copyright reporting forms, it never as-

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[16] Transcript of Status Hearing, April 22, 1986, at 25. Nowhere is the Copyright Office given statutory authority to make substantive policy determinations regarding Section 111. Indeed, Congress created a separate entity, the Copyright Royalty Tribunal, and charged it with responsibility for distributing the royalty fees collected and also for periodically adjusting the royalty rates to account for changing circumstances. 17 U.S.C. §§ 801 *et seq.* (1982 & Supp. IV 1986).

[17] To avoid the need for private copyright negotiations, Section 111 provides that the government act as an intermediary "clearinghouse." Cable operators deposit compulsory royalty fees with the Copyright Office. The Copyright Royalty Tribunal then reviews the aggregate composition of broadcast programming carried by cable systems and determines what percentage of the royalties collected should be distributed to each copyright owner.

cribes to the office the authority to certify or deny compliance with the Act's requirements.[18]

To be sure, Section 702 of the Copyright Act authorizes the Register of Copyrights, as director of the Copyright Office, "to establish regulations . . . for the administration of the functions and duties made the responsibility of the Register under this title." 17 U.S.C. § 702 (1982). But this authorization has never previously been construed to give the Office the right to determine the scope of compliance with the Copyright Act.[19]

In short, the Copyright Office may interpret the Copyright Act insofar as necessary to design appropriate forms for filing compulsory copyright payments. It may even provide advice to cable operators as to how these forms should be completed. But this

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[18] A cable operator automatically secures a compulsory copyright license under Section 111 upon filing the requisite reports and royalties with the Copyright Office. Under Chapter 5 of the Copyright Act, 17 U.S.C. § 501 *et seq.* (1982), if a copyright owner shows *in court* that the requirements of Section 111 have not been met, the operator becomes a copyright infringer and is liable for damages.

[19] Section 702 of the 1976 Copyright Act derives directly from Section 53 of the 1909 Act. The 1909 provision provided that "the register of copyrights shall be authorized to make rules and regulations for the registration of claims to copyright as provided by this Act." The accompanying House Report explained that the provision "for the making of rules and regulations does not confer upon the register any judicial functions." H.R. Rep. No. 2222, 60th Cong., 2d Sess. (1909). The Copyright Office has reiterated in various public notices that it is the judiciary, not the Copyright Office, that must decide whether the statutory requirements of Section 111 have been met. *See, e.g.*, 44 Fed. Reg. 73123, 73127 (1979); 48 Fed. Reg. 6372 (1983).

limited ministerial role does not allow the Copyright Office to determine the substantive rights of private parties under the Copyright Act.[20]

B. The Copyright Office Is Institutionally Biased in Favor of Copyright Owners and Not Entitled to Deference in Resolving Disputes Between Copyright Owners and Copyright Users.

In adopting Section 111, Congress fashioned a long-negotiated and carefully-balanced compromise between the interests of the cable operators and their consumers, on the one hand, and the copyright owners, on the other.[21] From its inception, however, the

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[20] Prior to the decision below, the courts had narrowly circumscribed the Copyright Office's authority. The Office was given latitude only in strictly ministerial functions, *see, e.g., National Conference of Bar Examiners* v. *Multistate Legal Studies, Inc.*, 692 F.2d 478 (7th Cir. 1982), *cert. denied*, 464 U.S. 814 (1983) (upholding ministerial decision regarding the retention of copyright works in the Office's files), and in determining whether a particular submission was "copyrightable." *See, e.g., Esquire, Inc.* v. *Ringer*, 591 F.2d 796 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 908 (1979). Assuming for the sake of argument that the Office is entitled to deference in resolving whether something is "copyrightable," it does not follow that the Office is entitled to deference here. Unlike the controversy in this case, resolving whether something is "copyrightable" is critical to the Office's "depository" function. Moreover, in contrast to this case, resolution of the "copyrightability" issue does not necesarily place the interests of recognized copyright owners (whom the Office serves) in conflict with copyright users.

[21] "The difficult problem of determining the copyright liability of cable television systems" was before Congress for a decade prior to adoption of the 1976 Act. H.R. Rep. No. 1476, *supra* note 4, at 89, 1976 U.S. Code Cong. & Admin. News at 5703. Congress recognized that "[n]either the full liability sought by the copyright interests, nor the complete exemption sought by

Copyright Office has had an institutional bias favoring copyright owners. By deferring to the Copyright Office's substantive interpretation of the Act, the court below tilted that balance toward the copyright owners in a way Congress did not intend.[22]

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the [cable] interests would be appropriate or fair." H.R. Rep. No. 83, 90th Cong., 1st Sess. 1, 51-52 (1967). Section 111, as drafted, "attempt[ed] a compromise between the[se] extreme positions." *Copyright Law Revision: Hearings on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. 132 (1975) (statement of Irwin Goldbloom, Deputy Assistant Attorney General) [hereinafter cited as *Hearings*].

Supporters of Section 111 proudly noted that it "reflect[ed] a compromise" between NCTA and MPAA, and "reconcil[ed] many conflicting interests as fairly, as justly, and as constructively as possible." 122 Cong. Rec. 31,984 (1976). "In working out this formula, the committee . . . arrived at a solution which . . . is workable and is fair and equitable to both the owners and users of copyrighted materials and which also protects and serves the public interest." *Id.* at 32,009. *See also* H.R. Rep. No. 1476, *supra* note 4, at 362, 1976 U.S. Code Cong. & Admin. News 1976 at 5804.

Section 111 proponents were well aware of the fragility of the statutory compromise. Recognizing that the legislation "impose[d] copyright liability for the first time on several industries, including cable television," one Senator expressed his "concern that these industries not be overpowered by long established and more prominent industries who also have an interest in this bill." 122 Cong. Rec. 3822 (1976). In opposing a pending amendment, he explained that Section 111 "is a fair and equitable balance for all parties. However, it is a delicate balance, and one that I earnestly hope will not be upset." *Id.* at 3823.

[22] As the Seventh Circuit has noted:

> [W]here a statute strikes a political balance but administration of the statute is entrusted to an agency that may not embody that balance, it is dangerous to defer automatically

The institutional tilt of the Copyright Office is pronounced and undisputed. In the legislative hearings prior to adoption of the 1976 Copyright Act, then-Register of Copyrights Barbara Ringer conceded that she viewed her responsibilities as solely to the copyright holders:

> My feeling as the head of the Copyright Office is that my responsibility is to one group and one group only, and that is the group that is identified as the sole and only beneficiary of the copyright law of the United States under the Constitution, the authors of the so-called writings.[23]

She urged Congress that, in fashioning a "compromise" between copyright owners and copyright users, "it is vitally important that you consider the effect of a particular provision on the individual author and not primarily of its effect on an economic group using the author's work for good or ill."[24]

> to the agency's view. An agency that may be dominated by one faction in the legislative struggle that led to enactment of a compromise is not authorized to hand that faction a victory that was denied it in the legislative arena through the efforts of an other faction. The court must enforce the compromise, not the maximum position of one of the interest groups about which the compromise was struck.

Bethlehem Steel Corp. v. *EPA*, 723 F.2d 1303, 1309 (7th Cir. 1983).

[23] *Hearings, supra* note 21, at 106 (statement of Barbara Ringer, Register of Copyrights). Ringer went on to state, "I am profoundly of the belief that authors in this country have been treated shabbily and stingily from the very beginning of our copyright system." *Id.*

[24] *Id.* Former Register and Honorary Consultant in Copyright

The Copyright Office has, in fact, never hidden its dislike for cable's compulsory copyright license.[25] Nor has it made secret its approach to disputes regarding cable's compulsory copyright. It has explained that it "construe[s] the compulsory license strictly, since the burden of responsibility is on cable systems to prove that they have satisfied the legislature's conditions for a compulsory license in derogation of the otherwise recognized . . . property rights of copyright owners." 49 Fed. Reg. 14944, 14950 (1984).[26]

The tilt of the Copyright Office toward the copyright holders is not a matter of personalities or timing. It is institutional. To defer to the Copyright Office on matters affecting the rights of copyright owners vis-a-vis copyright users would be akin to giving a

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at the Library of Congress Abraham Kaminstein explained in congressional testimony, "I make no bones about favoring authors, composers, and artists." *Hearings, supra* note 21, at 94. Significantly, the Copyright Office, while steadfastly defending its interpretation before both the District Court and the Court of Appeals, never once attempted to refute NCTA's charge that it was, as an institution, biased in favor of the copyright owners.

[25] *See, e.g., Oversight of the Copyright Act of 1976: Cable Television Hearings Before the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 97, 149 (1981) (statement by Donald Ladd, Register of Copyright, advocating elimination of the compulsory copyright license).

[26] In placing the "burden of responsibility" on cable systems, the Copyright Office overlooks the historical origins of the compulsory copyright provision. Prior to the adoption of the 1976 Copyright Act, this Court had ruled that cable systems were free to retransmit broadcast programming without paying any royalties whatsoever to the copyright owners. *Fortnightly, supra*; *Teleprompter, supra*. Thus, cable's compulsory copyright license constituted an expansion, rather than a contraction, of the rights of copyright owners.

trustee deference in resolving a dispute between the trust's beneficiary and a third party. The trustee has no choice but to interpret the trust agreement in a manner advantageous to the trust's beneficiary. Recognizing and acting on this fact, as Congress did in precluding the Copyright Office from playing an active role in defining the substantive rights of copyright owners and users, is no slight on the integrity of the trustee.

Certainly, there is nothing in the record to suggest that Congress wanted Section 111 interpreted by an entity that would invariably resolve issues in favor of the copyright owners. To the contrary, Congress took pains to avoid placing the Copyright Office in a situation where its loyalty to copyright owners might threaten the integrity of the compulsory copyright compromise. It created the Copyright Royalty Tribunal and relied upon the Tribunal, rather than the Copyright Office, to adjust periodically the rates for the various compulsory copyright licenses included in the 1976 Copyright Act. And it left resolution of disputes over the amounts necessary to earn the compulsory license to private litigation between the copyright owners and users. Congress was not blind to the inability of the Copyright Office to balance the needs of both copyright owners and copyright users in setting rates intended to provide a fair return to both parties.[27]

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[27] In light of the delicacy of the compromise underlying Section 111, Congress placed numerous restrictions on the Tribunal's discretion to adjust rates for this particular compulsory license. *See* 17 U.S.C. § 801 (1982 & Supp. IV 1986).

C. The Copyright Office Is a Part of the Legislative Branch and Not Entitled to Deference When Assuming Functions Reserved for the Executive Branch.

The court below granted the same deference to the Copyright Office's substantive interpretation that the court would grant to "any other agency." But the Copyright Office is not "any other agency." It is a division of the Library of Congress and part of the legislative branch of government. Congress did not, and could not permissibly, delegate to the Copyright Office responsibility for determining the substantive rights of copyright holders and copyright users. To have done so would have violated the separation of powers doctrine. Although the Copyright Office is entitled to interpret the Copyright Act as necessary to perform its ministerial functions as depository for compulsory copyright payments, its interpretations are not entitled to judicial deference in infringement actions involving the substantive rights of private parties.

Recent decisions of this Court have affirmed the bedrock principle that the legislative branch cannot delegate power that properly resides in another branch. *E.g., Bowsher* v. *Synar*, 106 S. Ct. 3181 (1986); *INS* v. *Chadha*, 462 U.S. 919 (1983); *Buckley* v. *Valeo*, 424 U.S. 1, 137-43 (1976). The need to draw a bright line between the co-equal branches of government arises not simply out of procedural fussiness; "it is a breach of the National fundamental law if Congress . . . attempts to invest itself or its members with . . . executive power . . . ." *Buckley*, 424 U.S. at 121-22 (*quoting Hampton & Co.* v. *United States*, 276 U.S. 394, 406 (1928)).

The court below erred by deferring to the Copyright Office, an arm of the Congress, in interpreting the substantive rights of copyright users. As this Court pointed out in *Bowsher*, "[i]nterpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law." 106 S. Ct. at 3192.[28] But "[t]he structure of the Constitution does not permit the Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess." *Id.* at 3188. *See INS* v. *Chadha*, 462 U.S. at 951-59.

The court below assumed without analysis that substantive statutory interpretive powers are vested in the Copyright Office, as they are in "any other agency." But this Court's recent cases make clear that authority that might be delegated to an independent agency is not acceptable if delegated to a component or an agent of Congress. In *Bowsher*, for example, this Court voided that portion of a budget balancing statute that delegated executive functions to the Comptroller General of the General Accounting Office ("GAO").[29]

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[28] *See Universal Shipping Co.* v. *United States*, 652 F. Supp. 668, 674 (D.D.C. 1987) ("*Bowsher* makes clear that 'execution' involves making judgments about application of a statute in a particular instance and making actual interpretations of law in order to implement it").

[29] Because it found the GAO to be "a part of the legislative branch of government," *Bowsher*, 106 S. Ct. at 3192, the Court held that delegation of interpretive power to the Comptroller General is the "kind of congressional control over the execution of the laws [which] is constitutionally impermissible." *Id.* at 3189.

The same constitutional considerations as in *Bowsher* bar delegation of executive functions to the Copyright Office, a department of the Library of Congress. In his concurring opinion in *Bowsher*, Justice Stevens compared the Comptroller General to "other obvious congressional agents, such as the Librarian of Congress . . . ." *Id.* at 3205 n.25. Other courts have similarly recognized that "the Library of Congress is a congressional agency." *See, e.g.*, *Keeffe* v. *Library of Congress*, 777 F.2d 1573, 1574 (D.C. Cir. 1985).[30] The Copyright Office itself has stated that "[t]he Copyright Office is a department of the Library of Congress in the legislative branch. Neither the Library of Congress nor the Copyright Office is an agency within the meaning of the Administrative Procedure Act . . . ." 49 Fed. Reg. 14944, 14951 (1984).[31] Because the Copyright Office is a creature of Congress,

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[30] The "official handbook of the Federal Government", lists the Library of Congress and its Copyright Office as being part of the Legislative Branch. *United States Government Manual* 1986/87, pp. iii, v. Neither the Library of Congress nor the Copyright Office is listed among the "Executive Agencies" or "Independent Establishments" described in the Manual. The Manual states that "[u]nder the organic law, the Library's first responsibility is service to Congress." *Id.* at 50. Moreover, Library employees (including those in the Copyright Office) are exempt from the Hatch Act, which restricts political activity by executive branch employees, thus providing further evidence of the Office's independence from the executive branch. *Keeffe*, 777 F.2d at 1577 (Library of Congress personnel are legislative branch employees).

[31] The Copyright Office's structure and responsibilities as an "agency" are set forth in Chapter 7 of the Copyright Act. Section 701 establishes the Copyright Office as a part of the Library of Congress. 17 U.S.C. § 701(a) (1982).

its views on the substantive meaning of the Copyright Act are not entitled to deference by a court attempting to determine the respective rights of parties before it.[32]

II. THE STATUTORY INTERPRETATION ADVANCED BY THE COPYRIGHT OFFICE, AND UPHELD BY THE COURT BELOW, IS UNREASONABLE.

Even if the Copyright Office were accorded the deference due "any other agency," such treatment would hardly justify the decision of the court below. Section 111(d)(1)(B) provides that royalties shall be "computed on the basis of specified percentages of the gross receipts from subscribers . . . for the basic service of providing secondary transmissions of primary broadcast transmitters." App. 60a. The language of that provision necessarily precludes the inclusion of revenue from nonbroadcast sources in the gross receipts calculation.[33]

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[32] *See* E. Brylawski, *The Copyright Office: A Constitutional Confrontation*, 44 Geo. Wash. L. Rev. 1 (1975). *But see Eltra Corp.* v. *Ringer*, 579 F.2d 294, 298-301 (4th Cir. 1978) (Register of Copyrights is an executive officer via presidential appointment of the Librarian of Congress). The reasoning employed in *Eltra Corp.* has since been rejected by this Court. *Bowsher*, 106 S. Ct. at 3189-91 (Comptroller General is an agent of Congress despite appointment by the President).

[33] Although the practice of mixing valuable cablecast and broadcast programming in the same tier of service was not prevalent when the Copyright Act was adopted, the language and legislative history of Section 111 of the Copyright Act clearly reveal how Congress would have resolved the issue now presented. Thus, under the standard set forth by this Court, the D.C. Circuit erred in looking to the Copyright Office's interpretation. *See, e.g.*, *Chevron, U.S.A., Inc.* v. *Natural Resources*

The court below rejected NCTA's interpretation of the language of Section 111 largely because it believed the interpretation read the phrase "basic service" out of the statute. App. 22a. According to the court, under NCTA's approach, Congress could have based the royalty calculation simply on gross receipts "for secondary transmissions," rather than on gross receipts "for the *basic service* of providing secondary transmissions." *Id.* (emphasis added). But the term "basic service" was more likely intended as a limitation on gross receipts, rather than an expansion. It is through this phrase, and this phrase alone, that Congress indicated that the revenue base for the compulsory copyright fee was to be closely circumscribed. Without this clarification, revenue from a host of services relating, but not fundamental, to the delivery of broadcast retransmissions could be included in the gross receipts pool.[34] As evident in the Act's legislative history, the congressional compromise that resulted in Section 111 was rooted in carefully limiting the revenues to be included in the copyright computations.[35]

Defense Council, Inc., supra; *INS* v. *Cardoza-Fonseca, supra*; *NLRB* v. *United Food & Commercial Workers Union, Local 23, supra*.

[34] While the other parties to this case have clouded the issue, the statutory phrase actually supports, rather than undermines, NCTA's position. Using its ordinary meaning, the phrase suggests that cable revenue should be included in the compulsory copyright calculation only so long as it derives directly from broadcast retransmission *and from nothing else*. Where a single charge covers a multitude of services, the phrase dictates that only the component attributable to providing broadcast programming be considered.

[35] *See* H.R. Rep. 1476, *supra* note 4, at 96 (excluding receipts

NCTA's interpretation is consistent not only with the language of Section 111, but also with the underlying logic. Because Congress established the compulsory license to cover broadcast signals, it was natural that the accompanying royalty would be based solely on cable revenues attributable to broadcast retransmission. As Section 111 made the right to retransmit each and every broadcast signal contingent upon a statutory grant, Congress was free to create a compensation formula that drew from all broadcast retransmissions. It does not follow, however, that Congress intended to subject nonbroadcasting programming to the same licensing obligations. Congress had no logical basis to demand an additional statutory payment for the right to carry programming which cable operators had already acquired and paid for through private negotiations.

Respondents' construction of Section 111, on the other hand, defies common sense. Two cable systems with the same total revenue and channel line-up could pay dramatically different compulsory copyright fees depending on whether the broadcast and cablecast channels were marketed separately or together. Yet, in affirming the reasonableness of the Copyright Office regulations, the court below explained: "We find no requirement in the statute or its history that the fee paid by a cable system reflect precisely the value it received from retransmissions .... Congress instead chose an easily calculable revenue base and used the DSEs [distant signal equivalent charges] to ap-

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for "pay cable" and "installation" from the copyright calculation). Even Register Ringer recommended against allowing the Copyright Royalty Tribunal to alter this revenue base. *Hearings, supra* note 21, at 1824.

proximate the value received by the cable companies." App. 24a. The conclusion overstates the mathematical effect of the DSE and dramatically understates its financial consequences.

The DSE charge was devised so that cable operators would pay higher copyright fees as they increased the number of distant signals they carried. This special charge for distant signals was premised on the understanding that cable's importation of distant signals has more of an effect on the copyright market than the carriage of local signals, which, by definition, are already available "over-the-air." But the DSE charge does *not* negate the need to calculate correctly the system's gross receipts.[36] The compulsory fee derives from multiplying together two variables—"gross receipts" and "DSEs." When two variables are multiplied, they produce a "proper" result only if both variables are themselves accurately stated.

Perhaps suspecting the weakness of its mathematical explanation, the court below concluded that the "imprecision" inherent in the Copyright Office regulations was not unreasonable in light of the "congressional goal of minimizing transaction costs." App. 25a. But its decision more than doubled cable's compulsory copyright payments. "Imprecision" of that magnitude cannot be justified as a matter of administrative convenience.[37]

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[36] This is especially true in the case of smaller cable systems (*i.e.*, those with semi-annual gross receipts below $292,000) because their compulsory copyright calculation does not even include a DSE factor.

[37] The court belittled the problem by suggesting that it can

Congress provided that the compulsory copyright fee shall be calculated on the basis of "gross receipts . . . for the basic service of providing secondary transmissions of primary broadcast transmitters." It is plainly unreasonable to construe that provision so that the resulting fees derive more from the carriage of cablecast programming than from the retransmission of broadcast programming.

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be avoided if cable operators would adjust their marketing practices to offer broadcast and cablecast programming separately. The court ignored marketing realities—best illustrated by comparing cable marketing to that of a conventional daily newspaper. A newspaper could theoretically sell each of its sections—*i.e.*, news, lifestyle, sports, etc.—for a separate price. For a variety of business reasons, newspaper publishers have determined that it is better to offer their product as a package for a single price. Cable operators should not be penalized for following a similar practice. In cable television, as in any competitive commercial endeavor, effective marketing is critical to economic success. The Copyright Office must not be allowed to transform Section 111 from a copyright regulation into a marketing regulation.

CONCLUSION

For the foregoing reasons, this Court should grant the writ and reverse the decision of the court below.

Respectfully submitted,

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May 4, 1988

APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-5552

CABLEVISION SYSTEMS DEVELOPMENT COMPANY

v.

MOTION PICTURE ASSOCIATION OF AMERICA, INC., et al.,
APPELLANTS

U.S. COPYRIGHT OFFICE AND ITS REGISTER

And Consolidated Case Nos. 86-5553,
86-5554, 86-5597, 86-5635, 86-5636 and 86-5637

Appeals from the United States District Court
for the District of Columbia
(Civil Action Nos. 83-01655, 83-02785 and 84-03097)

Argued October 15, 1987

Decided January 5, 1988

Stuart H. Newberger, Assistant United States Attorney, with whom *Joseph E. diGenova*, United States Attorney, *Dorothy Schrader*, General Counsel, United States Copyright Office, *Royce C. Lamberth* and *Michael J. Ryan*, Assistant United States Attorneys, were on the brief for federal appellants/cross-appellees.

Richard M. Cooper, with whom *Edward Bennett Williams*, *Robert W. Hamilton*, *Paul Mogin*, *Arthur Scheiner* and *Dennis Lane* were on the brief for appellants/cross-appellees, Motion Picture Association of America, Inc., et al.

Jay E. Ricks, with whom *David J. Saylor*, *Gardner F. Gillespie*, *Steven J. Horvitz* and *Brenda L. Fox*, were on the brief for appellee, National Cable Television Association, Inc. *Michael S. Schooler* also entered an appearance for appellee, National Cable Television Association, Inc.

Mark J. Tauber and *Michael A. Schlanger*, with whom *Deborah C. Costlow* and *Nora E. Garrote* were on the brief for appellee/cross-appellant, Cablevision Company.

Phillip R. Hochberg, for National Basketball Association and National Hockey League, *Ritchie T. Thomas* and *Judith Jurin Semo*, for National Collegiate Athletic Association, *David H. Lloyd*, *Robert Alan Garrett*, *Terri A. Southwick*, and *Edwin M. Durso*, for Major League Baseball, *Victor E. Ferrall, Jr.* and *John I. Stewart, Jr.* for National Association of Broadcasters, *Bernard Korman* and *I. Fred Koenigsberg*, for American Society of Composers, Authors and Publishers, *Charles T. Duncan* and *Michael Faber* for Broadcast Music, Inc., *Nicholas Arcomano* for SESAC, Inc., *Gene A. Bechtel* for Public Broadcasting Service, *James S. Gorelick* for National Public Radio, *John H. Midlen, Jr.* for Old-Time Gospel Hour, and *Douglas G. Thompson, Jr.* for Canadian Broadcasting Corp., were on the brief for amici curiae, National Basketball Association, et al.

Robert W. Coll also entered an appearance for amici curiae, National Hockey League.

Before: ROBINSON, RUTH B. GINSBURG and SILBERMAN, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* SILBERMAN.

SILBERMAN, *Circuit Judge*: The Copyright Act of 1976, 17 U.S.C. §§ 101 *et seq.* (1982 & Supp. IV 1986), grants cable television systems a license to retransmit copyrighted broadcast [1] programming to their subscribers, *id.* § 111(c)(1), and requires in return that the systems deposit with the Copyright Office a fee equal to a "specified percentage[] of the gross receipts from subscribers to the cable service . . . for the basic service of providing secondary transmissions of primary broadcast transmitters," *id.* § 111(d)(1)(B).[2] In a series of complaints consolidated for trial, a trade association representing the cable television industry and Cablevision, an individual cable company, sued several copyright owners seeking a declaration of the meaning of the above-quoted language. The copyright owners filed counterclaims against Cablevision for copyright infringement, alleging that Cablevision's interpretation of the statutory phrase led to an underpayment of the required fee and thus made

[1] Throughout this opinion, a "broadcast" program is one originally propagated by traditional over-the-air television signals for receipt by antenna, and a "cable-originated" or "non-broadcast" program is one produced solely for cable systems and disseminated only through them. "Transmission" is a general term denoting any means of delivering programming. Thus, a broadcast program could be retransmitted over cable.

[2] In 1986, Congress amended 17 U.S.C. § 111(d) by eliminating old § 111(d)(1) and redesignating accordingly. Pub. L. No. 99-397, § 2(a). The subsection at issue here, new § 111(d)(1), appears as § 111(d)(2) in the district court's opinion.

the company an infringer. On the district court's order, the trade association joined the Copyright Office as a defendant.

On cross motions for summary judgment, the district court rejected the Copyright Office's interpretation of the statute—that gross receipts "include the full amount of monthly (or other periodic) service fees for any and all services or tiers of services which include one or more secondary transmissions of television or radio broadcast signals," 37 C.F.R. § 201.17(b)(1) (1987)—as inconsistent with congressional intent and endorsed instead the position of the trade association. *Cablevision Co. v. Motion Picture Ass'n of Am.*, 641 F. Supp. 1154, 1161 (D.D.C. 1986). The court ordered the Copyright Office to modify its regulation to accord with the court's perception of congressional intent. The district court then dismissed the counterclaims for infringement on grounds that there had been no violation of "the spirit of the law." *Id.* at 1163. The copyright owners, the Copyright Office, and Cablevision appeal, putting forward a wide variety of arguments for reversal or modification of the district court's order. We hold that the Copyright Office has the authority to issue regulations interpreting the statutory language at issue and that its interpretation was a reasonable one. We agree with the district court's rejection of Cablevision's reading of the statutory term "basic service," but hold that the district court erred in declining to defer to the Copyright Office's regulation as to what revenues make up "gross receipts." We also reverse and remand for further proceedings regarding the counterclaims. The basis for the district court's dismissal is unclear, and the record before us is insufficient to allow us to rule as a matter of law on whether infringement occurred.

I.

This case presents a dispute over the structure of a statutory fee that cable television operators must pay for

the right to retransmit broadcast television programming. Those who pay the fee, the cable systems, advocate a construction that the eventual recipients of the fee, the copyright owners, find objectionable. The dispute arose because, after governmental intervention designed to correct a market imperfection, the market evolved in unanticipated directions. The disagreement has its roots in two Supreme Court decisions, *Teleprompter Corp. v. Columbia Broadcasting System*, 415 U.S. 394 (1974), and *Fortnightly Corp. v. United Artists Television*, 392 U.S. 390 (1968), that held retransmissions by cable television systems of broadcast programming, whether of local or distant origin, did not constitute "performances" under the copyright law and thus did not give rise to liability for infringement. The *Teleprompter* Court concluded that if the Copyright Act of 1909 was inadequate to govern the commercial relationships that had emerged in the interim, it was for Congress to create a substitute. 415 U.S. at 414.

Thus prompted, Congress, as part of its revision of the copyright laws, addressed in particular this problem of "secondary transmissions." When a cable system takes a broadcast signal ("primary transmission") and delivers it to the system's subscribers ("secondary transmission"), the system is earning money by selling to its customers the copyrighted material licensed only for the primary broadcast transmission. Under *Fortnightly* and *Teleprompter*, the copyright owner was unable to share directly in those revenues. Congress was of the view that the copyright holders should receive direct compensation for the use of their rights. But Congress also recognized that the transaction costs accompanying the usual scheme of private negotiation that controls the use of copyrighted materials could be prohibitively high. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 89, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 5659, 5704. The operator of a small cable system in a rural area, for

instance, might find it more profitable to forgo rebroadcasting a wide variety of signals rather than to negotiate with various copyright owners in Atlanta, Chicago, and Los Angeles; cable operators, subscribers, and copyright holders would all be worse off under such circumstances than in a world where the retransmission rights could change hands at a lower cost. Congress saw that neither the situation as it existed after *Fortnightly* and *Teleprompter* nor a replication of classic copyright arrangements would be entirely satisfactory.

The response was a new regime, embodied in section 111 of the revised Act. Congress first abandoned the notion of individual negotiation in favor of a compulsory license. Under § 111(c) of the Act, a cable system may retransmit to its customers any primary transmission made by a broadcast station licensed by the Federal Communications Commission.[3] In exchange for this privilege, however, the cable systems are required to pay a fee, to be distributed to the copyright owners as surrogate for the royalties for which they might have negotiated under a pure market scheme.

In devising that fee, Congress drew a crucial distinction between local and distant broadcast signals. The House Judiciary Committee observed that "there was no evidence that the retransmission of 'local' broadcast signals . . . threatens the existing market for copyright program owners." H.R. REP. NO. 94-1476, *supra*, at 90. Because local[4] retransmission does not carry the signal

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[3] *I.e.*, the familiar network and local programming that can be received with an antenna. The words "station" and "channel" are synonymous for purposes of this opinion and refer to an entity that transmits by broadcast or cable a single regular schedule of programming. For example, a local affiliate of a network is a station or channel, as is a cable-originated entity such as ESPN that offers a single complete bill of fare.

[4] The technical definition of local, which appears at 17 U.S.C. § 111(f), is not at issue in this case. For conceptual

to households beyond those local advertisers would be willing to pay to reach, the advertising revenue base will be increased by any expansion of the scope of the dissemination due to the retransmission, and copyright owners will be able to negotiate with the broadcaster to receive appropriate compensation. By the same token, the retransmission of network signals, from whatever distance, causes no difficulty. Advertisers on national network television—such as CBS—expect to reach audiences nationwide and pay accordingly. Because national advertisers will pay to reach any incremental viewers, networks will be willing and able to pay copyright holders the full value placed on the receipt of the program by viewers (as measured by the willingness of advertisers to buy time during the program). *Id.* Distant non-network programming is altogether another matter. Local advertisers will not pay extra to reach viewers who cannot reasonably be expected to patronize their businesses, so the revenue base from which to compensate the owners understates the value of the use of the materials, and the copyright holders would, absent an adjustment mechanism, be undercompensated. *Id.*; *see also National Cable Television Ass'n v. Copyright Royalty Tribunal*, 689 F.2d 1077, 1079 (D.C. Cir. 1982). The Act therefore allows the copyright owners of *distant non-network programs* to receive a portion of the fees paid to the cable systems by subscribers. 17 U.S.C. § 111(d)(3)(A).

Congress' broad purpose was thus to approximate ideal market conditions more closely than would either the *Teleprompter* or individual negotiation models; the compulsory license would allow the retransmission of signals for which cable systems would not negotiate because of

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purposes, a signal is "local," as opposed to "distant," if the subscribers of a particular cable system can receive the broadcast signal with an antenna. *See, e.g., Teleprompter*, 415 U.S. at 401 & n.7.

high transaction costs, and the owners of copyrights for non-network programs carried on cable systems far from the original area of broadcast—who could not receive full value out of advertising revenues—would receive compensation out of the fees paid by the systems.

The disputed fee computation comprises two parts and is deceptively simple in principle. The cable system first calculates "the gross receipts from subscribers to the cable service during [the applicable] period for the basic service of providing secondary transmissions of primary broadcast transmitters." 17 U.S.C. § 111(d)(1)(B). By using one of three formulas, selected according to the amount of gross receipts, the system then determines what percentage of gross receipts is due as a fee.

For larger cable systems, the percentage of gross receipts owed depends upon the number of *distant signal equivalents* ("DSEs") carried by the system.[5] The DSE figure is calculated by assigning a value of 1.0 to each distant independent station carried and 0.25 to each distant network station or distant noncommercial educational station, and summing. *Id.* § 111(f). The lower value is assigned to distant network affiliates because the bulk of their programming is provided by the networks and, as described above, copyright owners of network broadcasts are presumed to be fully compensated out of revenues from advertisers seeking to reach the national market. The fee owed rises by a certain per-

[5] Congress was concerned about the potential impact of the fees on smaller systems, especially since many such systems must carry more distant signals to compensate for sparse local broadcasting, and therefore provided them special relief. *See* H.R. REP. NO. 1476, *supra*, at 96-97; S. REP. NO. 473, 94th Cong., 1st Sess. 81 (1975). Systems with semiannual gross receipts of $75,800 or less pay a flat fee of $28. Systems with semiannual gross receipts of more than $75,800 but less than $292,000 pay a fee based on set percentages of gross receipts without regard to DSEs. *See* 17 U.S.C. § 111(d)(1)(C), (D); 37 C.F.R. § 308.2(b).

centage of gross receipts—which percentage, established by regulation, declines as the number of DSEs rises—for each incremental DSE. *See id.* § 111(d)(1)(B); 37 C.F.R. § 308.2(a).[6] Thus, a large (gross receipts greater than $292,000) cable system that carried one distant signal equivalent would pay 0.893% of gross receipts, a comparable system with a DSE of 2.0 would pay 1.456%, and a similar system with a DSE of 5.0 would pay 2.847%. A system with a DSE of less than one, however, would also pay 0.893%. 37 C.F.R. § 308.2 (a)(1); *see also* H.R. REP. NO. 94-1476, *supra*, at 96. The Act does not require perfect correlation between the number of distant signals retransmitted and the fee paid, but it operates roughly to charge systems according to the number of distant signals they use. *See supra* note 5 (small systems pay regardless of signal use). Finally, the fees are distributed to the designated copyright owners by the Copyright Royalty Tribunal ("CRT"), a body created by the Copyright Act to administer certain of its provisions.[7]

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[6] The declining proportion of gross receipts added to the fee for each additional DSE is appropriate since, *ceteris paribus*, the revenues of a *large* system, *see supra* note 5, could be expected to rise with each new signal. The mechanism provides for a more uniform dollar-per-subscriber-per-signal fee.

[7] 17 U.S.C. § 801. The CRT performs two main tasks relevant here. The first is the quasi-judicial function of distributing among copyright owners the fees paid to the Copyright Office under section 111, thus completing the statutory substitute for market transactions. *Id.* § 801(b)(3); *see also id.* § 111(d)(3), (4). Second, the CRT has the quasi-legislative responsibility to adjust the fee rates to reflect inflation or cable system subscription rate changes in order to maintain the real per-subscriber royalty fee which existed at the date of enactment. *Id.* § 801(b)(2)(A). The CRT also has the power to adjust overall rates to maintain reasonableness in the light of FCC rule changes. 17 U.S.C. § 801(b)(2)(B), (C). The CRT has no responsibility or authority to define gross receipts or otherwise to determine the relative share of the total fund

The foregoing description of the operation of section 111 is common ground for the parties. The dispute centers on the definition of "gross receipts . . . for the basic service of providing secondary transmissions," the base amount from which the fee is calculated and on which depends the size of the fund the CRT distributes. Congress did not define "gross receipts" or "basic service" in the 1976 Copyright Act, but an examination of the reports on the legislation evokes a fairly sharp image of the model that Congress had in mind at the time of enactment. According to that picture, the cable subscriber had available from the system a single package for a flat fee containing a number of retransmitted broadcast signals and some channels produced just for cable—the "basic service" that every subscriber received—and beyond that, individually priced specialty channels available only on cable from which the subscriber to the basic service could pick and choose—"pay cable." *See, e.g.*, H.R. REP No. 94-1476, *supra*, at 88.[8] In this paradigmatic case, the definition of gross receipts from basic service was simple; gross receipts were the flat fee for the initial package multiplied by the number of subscribers. It was clear from the outset that receipts for pay cable and other charges unrelated to programming, such as those for installation, were not to be a part of gross receipts, *see* H.R. REP. NO. 99-1476, *supra*, at 96, and that proposition is undisputed before us.

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to be contributed by individual cable systems. *See* 17 U.S.C. § 803(a).

[8] The legislative history does not make it absolutely clear whether Congress understood the term pay cable to encompass only individually priced non-broadcast stations—the usual content of the term, *see Home Box Office, Inc. v. FCC*, 567 F.2d 9, 18 & n.8 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977)—or to include the possibility of a package of several cable-originated channels offered for one price. As the remainder of this opinion will indicate, we need not reach the question and therefore leave it unanswered.

Primarily because of technological constraints, the initial package consisted largely of the retransmission of local broadcast signals and of certain rather rudimentary cable-originated programming—mostly automated time, weather, and news services and access channels available to local citizens as an outlet for speech, *see* 47 C.F.R. § 76.254 (1976). As a rule, such cable-originated services were not greatly prized by subscribers and whether they were included in the gross receipts pool was a matter of negligible concern.

Evolution of the cable industry and its marketing practices rather quickly made the meaning of gross receipts problematic, however, as reality diverged from the model on which the Act was based. As improvements in terrestrial technology gave cable systems increased channel capacity, advanced satellite services allowed cable transmissions to be offered nationwide. These developments ushered in such familiar and popular cable-originated stations as ESPN and CNN and made possible the development of "superstations," stations broadcast in one location but carried nationwide by cable, such as WTBS from Atlanta and WGN from Chicago.[9] Because the initial package offered to subscribers might now contain, for one price, local broadcast programming, distant broadcast programming (*e.g.*, WTBS), and highly desirable cable-originated programming (*e.g.*, ESPN), the question arose whether cable companies could allocate part of the initial package's subscription price to cable-

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[9] As advertisers recognize that the superstations reach national audiences, one would expect the charges for advertising time to rise, allowing copyright owners to negotiate appropriate royalty fees from superstations as they do from networks. The statutory scheme could thus become superfluous for perhaps the most important category of distant broadcast programming. *See Operators Rate WTBS, ESPN Most Valuable Basic Services*, Multichannel News, July 4, 1983, at 1 (listing superstation WTBS as one of the most lucrative cable properties other than pay cable).

originated programming and exclude that amount from gross receipts. Changes in the marketing of cable services added to the confusion. The practice of selling a single initial package plus individually priced pay cable stations gave way to tiering: the offering of several different packages, or tiers, of stations, with each tier separately priced.[10] And each tier might contain both broadcast and cable-originated stations. The question soon arose of whether entire tiers could be excluded from gross receipts as well as whether it was permissible to exclude revenues from non-broadcast channels within a "mixed" tier that contained both broadcast and non-broadcast channels. Because the congressional debates centered on a model of the cable industry that omitted such complexities, no obvious answers were available.

We thus arrive at the crux of this case—whether revenues from all tiers other than pay cable and from all channels within each included tier must be included in gross receipts. The cable companies argue that, since the statute was not meant to reimburse the copyright owners of *non-broadcast* programming, and since advertisers buy time on cable-originated stations that are carried nationwide such as CNN and ESPN just as they do on the broadcast networks, with the desire to address the entire audience actually reached, there can be no reason to include receipts for subscriptions to cable-originated channels in a fund designed to reimburse the owners of copyrights on distant *broadcast* programming. Therefore, the cable companies reason, revenues from non-broadcast channels or tiers that do not resemble the initial package envisioned by Congress should not be included in gross receipts.

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[10] For example, tier 1 could offer four local broadcast stations and an automated weather service plus ESPN and WTBS for $6, tier 2 could carry WGN and CNN for $3, and tier 3 could carry eight more cable-originated channels for $5.

The germ of a regulatory answer to these contentions appeared in 1978 in a revision of the Copyright Office's regulations implementing section 111. Those regulations emphasized that gross receipts included "the full amount of monthly (or other periodic) service fees," 43 Fed. Reg. 27,827, 27,832 (1978). The preamble explained that systems that furnished to subscribers "for a single monthly fee, a service that includes retransmission of radio and television signals and local origination (*such as time and weather and automated news services*)," *id.* at 27,828 (emphasis added), could not allocate a portion of the fee to the local origination services (and thereafter exclude that portion from gross receipts) because the Copyright Office could find "no statutory justification or basis for allocating" the fee. *Id.* The Office thus determined early on, albeit without considering the case of more valuable non-broadcast properties such as ESPN, that intra-tier allocation was impermissible.

In response to changes in the cable industry, and, most important for our purposes, to comments from cable system operators that a review of the definition of gross receipts was desirable, the Copyright Office undertook an exhaustive reevaluation of its regulations in 1981. 46 Fed. Reg. 30,649, 30,650 (1981). Among other items, it proposed to examine whether gross receipts from a particular tier could be prorated when that tier contained non-broadcast components and whether a system that offered tiered service should be required to include any, all, or part of revenues from tiers not received by all subscribers in gross receipts from basic service. *Id.* at 30,651.

In the public hearing, Robert W. Ross, Vice President for Legal Affairs and Government Relations of the National Cable Television Association ("NCTA"), a trade association for cable system operators, admitted that attempts to prorate revenues among channels offered on the same tier "would add an undue complication to the pro-

cess, and might well be a subject for substantial litigation and dispute. . . . [Attempting proration] is not the position that reflects the attitude of the Association. . . . I think you could create a regulatory monster . . . ." Hearings of July 28, 1981, Joint Appendix at 325-27. The resulting regulation issued some time later, in April of 1984. 49 Fed. Reg. 13,029 (1984). No doubt influenced in part by the NCTA's position, the regulation provides that "[g]ross receipts for the 'basic service of providing secondary transmissions of primary broadcast transmitters' include the full amount of monthly (or other periodic) service fees for any and all services or tiers of services which include one or more secondary transmissions of television or radio broadcast signals." 37 C.F.R. § 201.17(b)(1). In short, if a tier contains a broadcast signal, all subscription revenues from the tier are to be included in gross receipts.

This lawsuit cannot accurately be styled solely a challenge to that interpretation, for the first complaint was filed almost one year before the regulation took effect. Cablevision, a New York cable system operator, sought a declaratory judgment regarding the proper definition of gross receipts from basic service. Cablevision had since 1979, when it moved distant broadcast programming from the initial tier those channels occupied with local broadcast programming to an optional, higher tier, interpreted the term to include only those monies received for subscriptions to the first, or lowest, tier to which all customers were required to subscribe before electing higher tiers. Cablevision argued that its interpretation was correct because its definition of "basic service" comported with trade usage of the term and a consistent line of FCC and congressional use.[11]

The defendants to that declaratory action, the Motion Picture Association of America and eight of its member

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[11] Cablevision later filed a second complaint on behalf of three of its other systems that engaged in the same reporting practices.

companies ("Copyright Owners") filed counterclaims charging Cablevision with copyright infringement under section 111 for retransmitting broadcasts without paying the proper statutory fee. *See* 17 U.S.C. § 111(c)(2). The district court bifurcated the case; the first phase was to deal with the proper definition of gross receipts, the second, to follow if it was determined that Cablevision had not complied with the law, with the question of what copyrights had been infringed and what remedies were due.

The NCTA entered the battle in September of 1983 by filing a complaint for declaratory judgment regarding the meaning of the Act against the same defendants. It was the NCTA's position that cable systems should be allowed to attribute a portion of the revenues received as subscribers' fees for each tier containing both broadcast and cable-originated programming to the latter programming and to exclude that amount from gross receipts. In effect, the NCTA was challenging the decision of the 1978 regulations not to allow allocation and abandoning —indeed reversing—its position in the 1981 hearings before the Copyright Office. The district court ordered the NCTA to join the Copyright Office and the Register of Copyrights as necessary parties and then consolidated the cases and ruled on motions for summary judgment.

The district court declined to accord deference to the Copyright Office's regulation, holding that the regulation's definition of gross receipts did "not have a reasonable basis in law and frustrate[d] the underlying congressional policy." 641 F. Supp. at 1160. The district judge concluded that it "seem[ed] unfair" to require a cable system to pay the section 111 royalty fee on non-broadcast transmissions for which it had already paid merely because the channel was in the same tier with broadcast programming. *Id.* The court however rejected Cablevision's attempt to equate "basic service" with "first tier" as also inconsistent with Congress' purpose and as

inviting manipulation. It instead agreed with the NCTA that the statute requires revenues attributable to non-broadcast programming to be excluded from gross receipts and ordered the Copyright Office to devise a means of performing this allocation. *Id.* at 1162-63. Finally, the court dismissed the counterclaims, finding that Cablevision "did comply with the spirit of the law." *Id.* at 1163. On appeal, all parties but the NCTA attack the district court's definition of gross receipts, and the Copyright Owners seek reversal of the dismissal of their counterclaims.

II.

We agree with government counsel's statement at oral argument that, as applied to the cable industry as now constituted, section 111 is "not a model of clarity." The statute fails to define the basic terms at issue here, and the legislative history strongly indicates that Congress never considered the arguments now before us. The instant case thus would seem to be controlled by *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), in which the Supreme Court addressed the "bubble concept" for defining "stationary source" within the Clean Air Act Amendments of 1977 and concluded that an examination of the legislation and its history revealed that Congress had no specific intention regarding the matter. *Id.* at 851, 862. The Court held that, in the face of such legislative silence, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.[12] But before we examine the reason-

[12] We are urged to undertake a more searching review on the strength of language in *INS v. Cardoza-Fonseca*, 107 S. Ct. 1207 (1987). Cablevision in particular argues that this case means that a court owes no deference to an agency whenever "a pure question of statutory construction," *id.* at 1221, is involved. The Supreme Court has recently confirmed, however, that the language in *Cardoza-Fonseca* does not alter the *Chevron* test—courts are to use the "traditional tools of statu-

ableness of the Copyright Office's interpretation, we must first deal with an anterior question: Does the promulgating agency, the Copyright Office, have authority to interpret the statute and are *its* interpretive regulations due judicial deference if reasonable?

Cablevision and the NCTA contend that the Copyright Office's interpretation is owed no deference because the Office has no authority to issue such a substantive regulation. The NCTA's position on this point, however, is paradoxical; it argues that "the Copyright Office lacks the legal authority and expertise to issue binding interpretations of the Copyright Act," yet at the same time asks us to direct that same Office to issue regulations (forms) to implement its general intra-tier allocation proposal. The awkwardness of the NCTA's position serves to emphasize that this statute is not self-executing. Given Congress' awareness of the rapid changes taking place in the cable industry, we cannot believe that Congress intended that there be no administrative overseer of this scheme. The statute's language is not to the contrary. Section 702 of title 17 of the United States Code authorizes the Register of Copyrights "to establish regulations . . . for the administration of the functions and duties made the responsibility of the Register under this title." More specifically, section 111(d)(1) of that title directs that cable systems deposit their compulsory license royalty fees with the Register of Copyrights, "in accordance with requirements that the Register shall, after consultation with the Copyright Royalty Tribunal . . ., prescribe by regulation."

Cablevision and the NCTA resist the obvious import of these passages by contending that this rulemaking

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tory construction" to determine congressional intent, and to defer to the agency's permissible construction when the statute is "silent or ambiguous." *NLRB v. United Food & Commercial Workers Union, Local 23*, 56 U.S.L.W. 4037, 4040-41 (U.S. Dec. 15, 1987); *see also id.* at 4043 (Scalia, J., concurring).

power is limited to the ministerial task of designing forms, and they present authority asserted to stand for the proposition that the Copyright Office is unusual among government agencies in that its interpretations of the statutes it administers are due no judicial deference. Of course, designing forms to implement the NCTA's proposal has a substantial policy component. But, more to the point, we observe that this case is fundamentally one of first impression regarding section 111 and hold that the cases cited do not, for reasons we will discuss, establish the general principle that the Copyright Office's interpretation of that statute can be ignored. Our holding on deference due the Office does not extend beyond the bounds of its interpretation of section 111, but we do believe the Office's construction of at least that section is due deference.

We have emphasized that the compulsory licensing scheme was a break from the traditional copyright regime of individual contracts enforced in individual lawsuits. If we agreed that the Copyright Office had no power to interpret the statute, every dispute over the meaning of the statute could give rise to an infringement action [13] where, as this case suggests, enormous damage claims are commonplace.[14] If, on the other hand, reasonable interpretations of the statute by the Copyright Office are due judicial deference, a copyright holder's incentive to bring infringement actions that are based on interpretations other than those of the Copyright Office would be reduced. Since Congress consciously rejected traditional, contract-based implementation as unworkable, a holding that forced resolution of every dispute in an infringement or declaratory judgment action would be unfaithful to this

[13] No party argues that the CRT or the FCC, or anyone other than the Copyright Office or the judiciary, has authority to interpret the language in question.

[14] Cablevision suggests it could be subject to a $3 billion judgment.

policy choice and antithetical to Congress' central concern of providing a low cost transfer of copyrighted materials.

We are also unpersuaded by the suggestion that no deference is due the Office because it lacks expertise in this field. The Copyright Office certainly has greater expertise in such matters than do the federal courts; and while watching over the cable industry may have been a novel brief for the Copyright Office when the new Act was passed, that agency has had time to accumulate experience. But, in any event, *Chevron*'s rationale for deference is based on more than agency expertise.

> [A]n agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. . . . [I]t is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

Chevron, 467 U.S. at 865-66. Like the Court in *Chevron*, we are faced with several interpretations of ambiguous language which really involve competing policies among which Congress did not explicitly choose. We see no reason to deny the Copyright Office's legitimacy in selecting, as the EPA did in *Chevron*, among those choices so long as the interpretation selected is reasonable.

The Supreme Court implicitly considered whether deference is due the Copyright Office's construction of the Copyright Act in *DeSylva v. Ballentine*, 351 U.S. 570 (1956). Resolving a dispute between an author's widow and his illegitimate child, the Court took note of Copyright Office regulations, recently rescinded though apparently still followed in practice, that ostensibly governed the issue. The Court stated that it "would ordi-

narily give weight to the interpretation of an ambiguous statute by the agency charged with its administration," *id.* at 577-78, but declined to rely on the interpretation because the fact that the practice was "more the result of a decision that there is substantial doubt over the question, rather than the result of a confident interpretation of the statute" deprived the practice "of any force as an interpretation of the statute," *id.* The Supreme Court has thus indicated that it would defer to the Copyright Office when the latter actually interpreted the statute, undermining the notion that the Office is never owed deference.[15]

To be sure, the Copyright Office in this case may have come close to the point of excessive diffidence identified in *DeSylva.* In its statement promulgating the 1984 regulations, the Office "welcome[d] the guidance of the courts on 'tiering,'" but concluded it could not justify further delay in issuing regulations in light of requests from "the major interests affected by the compulsory license" that the agency take a position. 49 Fed. Reg. 13,029, 13,031 (1984). The Office also stated it could not "provide the flexibility requested by cable systems absent guidance from the Congress or the courts." *Id.* at 13,035. On balance, however, we conclude that the Office did see itself as having the authority to issue regulations and did make "a confident interpretation of the statute." *DeSylva,* 351 U.S. at 577. The Office stated that "[w]ith respect to administration of the Copyright Act in general and the compulsory licenses in particular, the Copyright Office must and does, however, interpret the Act." 49 Fed. Reg. 13,029, 13,031 (1984). After weighing the potential administrative costs of intra-tier allocation, it concluded that "the Copyright *Act* does not permit any proration or other allocations of either DSE's or gross re-

[15] The *DeSylva* Court may also have been unwilling to attribute to Congress an intent to delegate to the Copyright Office authority over a matter such as the descent of property that is traditionally entrusted to the states.

ceipts," *id.* at 13,035 (emphasis added)—*not* that the Office did not have the power to order the allocation. The Office thus did interpret the statute with the meaning of *DeSylva.*

Cablevision and the NCTA also rely on *Bartok v. Boosey & Hawkes, Inc.*, 523 F.2d 941 (2d Cir. 1975). The Second Circuit there refused to give weight to a definition of "posthumous" appearing on a Copyright Office form, stating flatly that "the Copyright Office has no authority to give opinions or define legal terms and its interpretation on an issue never before decided should not be given controlling weight." *Id.* at 946-47 (footnotes omitted).[16] But the court held the interpretation put forward by the Office was inconsistent with legislative intent, so its statement on the deference due the Office would seem to be a dictum. In any event, the Second Circuit was not considering section 111, and we cannot agree with Cablevision and the NCTA that the court's proposition, even if generally sound, should be extended to cover that section. We think Congress saw a need for continuing interpretation of section 111 and thereby gave the Copyright Office statutory authority to fill that role. Its interpretations are therefore due the same deference given those of any other agency. We thus turn to the reasonableness of the construction at issue.

III.

The regulation applies the language of 17 U.S.C. § 111 (d)(1)(B): "the gross receipts from subscribers . . . for the basic service of providing secondary transmissions of primary broadcast transmitters." We find it telling that the interpretations of that language offered by Cablevision and the NCTA as alternatives to the Copyright Office's regulation violate the canon of construction

[16] The *Bartok* court cites *DeSylva.* As our discussion of the latter case indicates, we do not believe it stands for this proposition.

that effect should be given to every word of the statute so that no part is rendered "inoperative or superfluous." *Norfolk & W. Ry. v. United States*, 768 F.2d 373, 379 (D.C. Cir. 1985), *cert. denied*, 107 S. Ct. 270 (1986). The NCTA's interpretation, adopted by the district court, would allow cable companies to assign monetary values to non-broadcast programming that is combined with broadcast programming in a mixed tier and to exclude those amounts from gross receipts. This approach reads "basic service" out of the statute; under this view, the language could as easily be "gross receipts from subscribers . . . for secondary transmissions of primary broadcast transmitters." By emphasizing only the delivery of discrete stations, this reading ignores the clear implication of the phrase "basic service" that cable services are typically provided in packages.

Cablevision, conversely, contends that "basic service" is a well defined term of art, meaning the first or lowest tier. But a necessary consequence of this interpretation is that all language that follows that term is superfluous. Indeed, since Cablevision contends basic service can contain anything the cable system chooses, and not necessarily just—or even any—broadcast retransmissions, *see infra* p. 29, the phrase "of providing secondary transmissions of primary broadcast transmitters," which would seem to serve the purpose in the statute of explaining "basic service," could actually *contradict* "basic service." The Copyright Office's regulation is thus the interpretation before us that best accounts for the statutory language.

The regulation also evinces a full understanding of the structure and purpose that underlie that language. In holding the regulation to be inconsistent with the will of Congress and adopting the interpretation espoused by the NCTA, the district court in our view misunderstood a fundamental mechanism of the statute. The court correctly observed that liability under the compulsory license

was to be limited to the retransmission of distant non-network programming, 641 F. Supp. at 1161; *see* H.R. REP. No. 94-1476, *supra*, at 90, but failed to appreciate how the distant signal equivalents satisfy that intention. Because the DSE value—and hence the percentage of the fixed gross receipts base due as a fee—rises with each distant broadcast channel retransmitted, the cable system pays only for distant non-network[17] programming actually broadcast.

That Congress intended the DSEs to correlate the number of distant signals carried and fees paid can be further established by examining the divergences of the content of the revenue base and the programs eligible for reimbursement from the CRT. Congress *never* contemplated a precise congruence of the royalties paid and the amount of distant non-network programming actually carried. Instead, Congress picked a *convenient* revenue base and used the DSEs to discount it in a reasonable manner. Attempting to fine tune the gross receipts base to include only revenues from items reimbursable by the CRT is a plausible approach *a priori*, but it ignores Congress' actual decision and would ultimately render the DSE mechanism superfluous. Congress' clear understanding that gross receipts were to include revenues from subscription fees paid in part for the retransmission of local broadcasts (that much is apparent from the statutory language alone) is, since such local broadcasts are programming not eligible to draw from the fund administered by the CRT, a strong indication of its approach.[18]

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[17] Recall that a DSE of 0.25 is assigned to the retransmission of a distant network affiliate's signal, to approximate the proportion of non-network programming carried by such a station.

[18] The same is true of network programming on distant network affiliates. *Gross receipts* are not reduced to account for the payment copyright owners already receive for network programming, *DSEs* are. *See supra* text accompanying note 6.

If an allocation between broadcast and non-broadcast programming revenues in each tier were required by the statutory scheme, one would wonder why Congress did not call for a further allocation, to remove local broadcast revenues from gross receipts, and do away with the DSE system altogether. The answer, it seems to us, must be that DSE calculations were considered more practical and were therefore adopted in lieu of attempts at such allocation. All cable systems, moreover, pay a section 111 fee regardless of whether they carry any distant signals. *See supra* note 5. A payment scheme that reflected usage exactly would not impose such a requirement. Finally, it should be noted that the Act was an attempt to simulate the market in the face of the market's inability to provide precise fits between retransmissions and royalty fees, and so the Act could not itself aspire to too much precision.

In short, the reasonableness of the regulatory requirement that all revenues from a tier containing one retransmitted broadcast signal be included in gross receipts cannot be attacked for its failure to allow cable systems to attribute a value to nonbroadcast programs and to subtract that value from gross receipts.[19] We find no requirement in the statute or its history that the fee paid by a cable system reflect precisely the value it received from retransmissions—indeed, as we have shown, in many cases the relationship is skewed considerably. Congress instead chose an easily calculable revenue base and used the DSEs to approximate the value received by the cable companies. The Copyright Office has simply continued that practice.

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[19] The regulation's stance on attribution is also due deference because of its relative contemporaneity with the enactment of the statute and its consistency. *See Udall v. Tallman*, 380 U.S. 1, 16 (1965). It has its roots in the 1978 regulation prohibiting attribution. *See* 43 Fed. Reg. 27,827, 27,828, 27,832 (1978).

Comparison of the Copyright Office's regulation with the position now espoused by the NCTA suggests a further reason deference is due the regulation. The NCTA's interpretation, endorsed by the district court, would create "a hornet's nest of problems."[20] If five channels are sold as a package for $5, and none is priced separately for individual sale, one can conclude nothing more about the revenue that each generates individually than that it does not exceed $5.[21] The artificiality of contending that each is worth $1 is obvious from the example of a tier containing ESPN and four weather channels. Nor do viewer measurement techniques such as the Nielsen ratings provide a solution. Methodological wrangles and monitoring expenses far in excess of those required under the Copyright Office's regulation are easily foreseeable and would thwart the congressional goal of minimizing transaction costs.

The Copyright Office's interpretation avoids these obvious pitfalls, and that practicality alone provides substantial support for the reasonableness of its interpretation. When Congress delegates a function to an agency, we believe that an important element of congressional purpose is that the function be carried out sensibly and efficiently. Congress recognizes that it can only legislate,

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[20] The phrase is that of Robert W. Ross, testifying on behalf of the NCTA in hearings held by the Copyright Office on July 28, 1981, regarding attempting to allocate revenues to particular items sold in a single tier for one price. Joint Appendix at 326; *see supra* p. 13. It is interesting that the regulation promulgated after the district court adopted the NCTA's approach simply directs cable systems to attribute any amount they see fit to cable-originated programming. It asks only that they maintain records of the amounts thus deducted from gross receipts. *See* 51 Fed. Reg. 30,214 (1986); *id.* 45,110. No obvious method of attribution suggests itself.

[21] We assume, perhaps unrealistically, that no television station would have a negative value for a large number of consumers.

not administer, so it necessarily relies on agency action to make "common sense" responses to problems that arise during implementation, so long as those responses are not inconsistent with congressional intent. In *Drummond Coal Co. v. Hodel*, 796 F.2d 503, 507 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 1593 (1987), for instance, this court agreed that the Secretary of the Interior's definition of "coal produced" was reasonable, noting that the Secretary adopted the regulation out of concern for the vexing complications and expense that accompanied competing approaches and for the need for a uniform national standard. Similarly, including all revenues from any separately priced tier that contains one or more broadcast stations is a convenient, indeed perhaps the only reasonable, way of computing gross receipts that ensures a revenue base large enough to perform the function Congress intended—reimbursing copyright owners.

The reasonableness of the regulation is further bolstered by the ability it provides cable systems to control their own destiny. *See* 49 Fed. Reg. 13,029, 13,035 (1984) (Copyright Office's discussion of final regulation); *see also Drummond*, 796 F.2d at 507 n.9 (coal companies can act to limit impact of interpretation). A company can segregate all its secondary transmissions into a single tier and thus avoid including in gross receipts any revenues from cable-originated programming. Although the Copyright Office has no authority to regulate the marketing practices of cable companies, the companies could on their own forgo those marketing advantages that now lead them to pay higher than necessary fees.

In its separate challenge to the reasonableness of the regulation, Cablevision puts forth an alternative that at least can be said not to present administrative complexity. Cablevision concedes that the gross receipts base was not necessarily intended to include only broadcast signals, and rather was selected to provide a clear, uniform, and constant base for the calculation of royalty

fees, but asserts that the regulation is unfaithful to the Copyright Act by failing to equate "basic service" with the first tier of service to which all customers must subscribe. Cablevision argues that basic service was at the time of passage of the Act a trade term with the meaning Cablevision suggests and that the language was consistently used in earlier bills in the same manner.

Because Congress never considered the issue of "mixed tiering" this view is not without surface plausibility. The legislative history shows that Congress contemplated only one "tier" containing a mixture of broadcast and cable-originated stations. All higher "tiers" in this model contained only cable-originated stations for a separate fee, and these pay cable services were excluded from gross receipts. *See* H.R. REP. NO. 94-1476, *supra*, at 96. Thus the tier from which gross receipts were to be calculated was at the same time all tiers (the only one) containing a broadcast signal—the Copyright Office's view—and the first tier alone—Cablevision's position.

As support for its construction, Cablevision points first to numerous affidavits of cable industry executives stating that basic service was an accepted trade term in the early 1970's, that it referred to the lowest tier of service, and that it was used interchangeably with "minimum level of service," "initial package," and "regular subscriber service." Cablevision contends the Congress must be presumed to have adopted this trade meaning. Our difficulty with this argument is that one can concede each step and not reach Cablevision's conclusion. Congress may have envisioned basic service as the first tier or the initial package when debating the Act, but it also viewed this level of service as the *only* level—other than tiers of pay cable that were to be excluded from gross receipts. The truth, it seems to us, is that Congress *never considered* the situation of multiple tiers containing broadcasting materials, and use of an industry definition from

a period when the practice under consideration was not widespread in the industry is singularly unenlightening.[22]

Cablevision nevertheless attempts to link its definition of basic service to the early concept of "adequate television service" that appeared in an unenacted Senate bill. *See* S. 644, 92d Cong., 1st Sess. (1971). That bill would have provided cable systems a compulsory license to retransmit local signals and any distant signals that would be a necessary complement to local broadcasting in providing "adequate television service"—service that would provide the system's customers access to a prescribed minimum range of stations—as defined by the Act. *See id.* § 111(c)(3). In return, cable systems were to pay a fee based on a percentage of gross receipts after reporting the "gross amounts paid to the cable system by subscribers for the basic service of providing secondary transmissions of primary broadcast transmitters." *Id.* § 111(d)(2). Cablevision argues that, since the language at issue in this case appeared initially in a bill relating to minimum or adequate service, basic service must be equivalent to "adequate" or "first tier" service.

Identity of language in an unenacted bill addressing adequate television service with language in an Act passed years later to deal with a transaction cost problem in the copyright law is not, by itself, particularly significant. Putting to one side the weight properly to be accorded an unenacted bill, we observe that words can take on vastly different meanings in different contexts. *See, e.g., Director v. Black Diamond Coal Mining Co.,*

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[22] A homely metaphor illustrates the tension between Cablevision's view and Congress' intent. Imagine a fee to be paid on the gross revenue from the sale of dressers, enacted at a time when dressers were available only as single pieces of furniture. With the advent of modular furniture, is it more in keeping with the statute's spirit to base the fee on revenues from the sale of bottom drawers only, which every customer must buy, or on the sale of all dresser drawers?

598 F.2d 945, 951 (5th Cir. 1979) (most words have multiple meanings, depending on context; absent evidence Congress intended to create a term of art, a word's meaning in one statute does not necessarily indicate its meaning in another). It is furthermore unclear whether the language of S. 644 does what Cablevision would have it do. The provision actually directing payment of a fee refers not to the "gross amounts paid . . . for the basic service" that the company is required to report, but to "the gross receipts from subscribers," presumably a much broader concept, even in Cablevision's view. *Id.* at § 111 (d)(2)(B).

The most troublesome aspect of this argument, however, is the explicit equation of basic service with adequate service. Cablevision has argued to us that the first tier—basic service in its parlance—may contain anything the cable system chooses. Its concept of basic service is therefore simply unrelated to adequate service, which presumably involves a specific content. And we are bemused by Cablevision's slightly misleading attempts to suggest that the FCC's "must-carry" rules, which require a cable system to provide certain services, assure a minimum content on the first tier. This court has twice struck down particular FCC must-carry rules as incompatible with the First Amendment. *Quincy Cable TV v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 106 S. Ct. 2889 (1986); *Century Communications Corp. v. FCC*, No. 86-1683 (D.C. Cir. Dec. 11, 1987).

Even where two equally tenable interpretations of a statute are put forward, one by the agency charged with administering the Act—as we have held the Copyright Office to be—and the other by a private party, we will favor the former. *See Udall v. Tallman*, 380 U.S. 1, 4 (1965). But on examination we find Cablevision's position untenable, since it could lead to the absurdity of only a minuscle portion of revenues, at the option of a cable

company, being included in gross receipts—hardly a reasonable interpretation of Congress' objective.[23]

For the foregoing reasons, we conclude that the Copyright Office's regulation is reasonable as applied to calculations involving any tier viewed in isolation, the primary element of dispute in this case. If we rested on this conclusion, however, we would omit discussion of a matter heavily debated in the briefs and at oral argument and relied on substantially by the district court. In the proceeding below, the district court allowed counsel for the NCTA to request from Dorothy Schrader, General Counsel of the Copyright Office, responses to certain hypothetical questions regarding the Office's interpretation of its regulation. Whether or not that procedure was appropriate, once it was employed—once the General Counsel's letter of reply had put this ancillary dispute in issue—we understand why the district court acted on the questions the letter raised.

Nevertheless, and despite the government's failure to argue the point explicitly, we believe that the issues raised in Schrader's June, 1986 letter are unripe for judicial review. But because the issue has been hotly litigated both before us and below, and, more importantly, because our conclusion regarding unripeness stems as much from the confusion created by the letter as from any intrinsic unsuitability of the issues for disposition, we find it necessary in explaining our conclusion to discuss in some detail the 1986 letter and the debate surrounding it.

The letter deals with marketing practices we will style "discounts" and "tie-ins." The following hypotheticals are addressed: A cable system offers tier A, containing

[23] We intimate no view as to whether the operation of the must-carry rules at an earlier time served to make Cablevision's behavior more or less willful. That issue is for the district court on remand. *See infra* Section IV.

all broadcast signals, for $10, tier B, containing two non-broadcast and two broadcast signals, for $4; and tier C, containing a pay cable station, for $9. General Counsel Schrader considers both a discount, offering all three tiers for $22, and a tie-in, under which the subscriber could receive tier A for $10 only after subscribing to tier C for $9. Schrader's opinion specifically requires the entire $22 discount price to be included in gross receipts, just as the $19 under the tie-in must be. She explained:

> Whenever the two types of service are offered for a single price or, if on separate tiers, whenever it is necessary to subscribe to one tier in order to receive another, the two services are in reality being offered as a single package of service; if secondary transmissions are included in the package, gross receipts from both tiers or the combined package must be reported and used in calculating copyright royalties.

Joint Appendix at 491 (emphasis omitted).

The NCTA argues, and the district court agreed, *see* 641 F. Supp. at 1160, that this language, if followed literally, would violate Congress' intent. They both read the letter to suggest that in precisely the paradigm case envisioned by Congress—in which the subscriber must purchase a basic package of retransmitted stations before going on to buy pay cable—receipts from pay cable must, contrary to Congress' specific intent, be included in gross receipts because "it is necessary to subscribe to one tier in order to receive" pay cable. We have some reason to believe, however, that the General Counsel was addressing a slightly different problem and merely expressed herself incompletely. Another, earlier letter from the General Counsel that appears in the record, Joint Appendix at 488, was written in August of 1985 and avoids the problem the 1986 letter seemingly creates.

The 1985 letter and the parties' presentations suggest the following analysis. Whenever a tier, call it Y, can be purchased only after another tier, X, has been purchased, there is a danger that the price associated with Y is merely notional. Thus, if Y contained broadcast signals that would be valued by consumers at $20, a cable operator bent on downward manipulation of receipts from the sale of Y could construct an X tier of automated services worth $1, make Y available only to subscribers to X, charge $19 for X and $2 for Y and, absent a requirement that the two amounts be lumped together, understate gross receipts for Y by $18 per subscriber. This technique will not work in reverse, however. Subscribers forced to buy through tier Y to be allowed to pay $19 for tier X will simply stop after buying Y, leaving the cable operator to absorb a loss or to raise the price to reflect value accurately. Generally, if a subscriber can buy a given tier without purchasing any others, its nominal price will be at least as great as its value; if the subscriber must purchase another tier to receive the one in question, the latter's price may be understated.

The language of the General Counsel's 1986 letter therefore would appear, as the district court discerned, to be too sweeping. Indeed, counsel for the Copyright Owners, a group whose interests would certainly be served by a strict adherence to the literal language of Schrader's letter, conceded it was "overbroad." The letter suggests that the two cases just described should be treated the same—revenues from both tiers should go into gross receipts regardless of whether X or Y must be purchased first—when there is a strong argument only the first should be so treated. The letter does analyze the tie-in case as we tentatively do, for in that hypothetical the broadcast signals in A can be bought only after purchasing C, so the price for A may be no more than nominal and there is a risk that gross receipts will be understated. The treatment of the discount seems

incorrect, though, for as we understand the hypothetical it would be possible to buy all the broadcast signals, A and B, alone for $14. That $14 price is therefore an accurate reflection of the value placed on the package and could be used in calculating gross receipts from retransmission from the $22 discount fee.

The Government's Reply Brief, moreover, adopts the analysis of the 1985 letter and seems to back delicately away from the inconsistencies in the 1986 letter. But at oral argument, counsel for the Government was unwilling to make any firm statement regarding the Copyright Office's position on this issue. We cannot, in light of this rather bewildering array of conflicting positions, affirm the reasonableness of this facet of the agency's interpretation of the statute. We nevertheless are quite unprepared to reject either the regulation or the interpretation in Schrader's 1986 letter on this basis. First, there is no showing as to the Copyright Office's actual practice in these cases. Requirements that subscribers "buy through" initial tiers of broadcast programming before receiving pay cable stations such as HBO are apparently widespread; it would be imprudent to invalidate an interpretation of a regulation on the subject, without more information, on the strength of one letter from the General Counsel replying to a hypothetical question.

Further, the rulemaking from which this regulation sprang never addressed tie-ins or discounting; it focused on the treatment of individual tiers. 49 Fed. Reg. 13,029 (1984). And the lawsuits now before us are focused on the first tier/basic service equivalence and the permissibility of allocating values within a tier. The tie-in and discount issues are a litigating afterthought, and we are uncertain from the record as to the Copyright Office's authoritative interpretation. It is often necessary to review agency action in a rather theoretical setting, but a court must have some sort of record upon which to base its review. There has been here no showing of an in-

terpretation to which the Office firmly adheres. The Supreme Court in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), observed that the purpose of the ripeness doctrine in the context of reviewing administrative action is to "prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Id.* at 148-49. If this dispute is not abstract, it is certainly not yet well defined enough for judicial review. The Copyright Office, will, we hope, clarify its position regarding tie-ins, perhaps in a rulemaking. Any party injured by the Office's new application of the regulation could, of course, seek relief from that concrete injury. *See Geller v. FCC*, 610 F.2d 973, 978 (D.C. Cir. 1979).

IV.

The district court ordered that the first phase of the trial consider "[w]hether plaintiff complied with the statutory prerequisite conditions for obtaining a compulsory license," and that a further hearing would be had, if it were determined that Cablevision was not entitled to a compulsory license, regarding "which copyrights of defendants have been infringed and the remedies therefor." In its opinion ending the first phase, the court dismissed the Copyright Owners' counterclaims. It noted that Cablevision had paid the fees indicated by its method of calculating gross receipts and had posted bonds to cover the difference between its payments and the amount required by the Copyright Office's regulation.[24] The court concluded Cablevision had complied "with the spirit of the law." 641 F. Supp. at 1163. The Copyright

[24] Cablevision had used its accounting convention since 1979 but posted bonds only for the periods after the 1984 issue of the regulation.

Owners point to the bifurcation order and claim this disposition was premature.

Section 111(c)(2) makes a cable system liable for infringement when, without paying the required royalty fee, it engages in the "willful or repeated secondary transmission" of primary transmissions. We recognize that the district court might have intended to conclude as a matter of law at the end of the first phase that Cablevision's conduct was neither willful nor repeated within the meaning of the Act.[25] The court did not couch its ruling in the statutory language, however, and while it might have thought "willful or repeated" equivalent to a disregard for the "spirit of the law," it did not clearly explain its reasoning. Nor did the court address how, if at all, Cablevision's conduct is to be judged in light of regulatory changes. Because we are unsure of the basis for the district court's dismissal and are unwilling to consider the issue of liability for infringement without the benefit of its full reasoning, and because it is also unclear whether the court's opinion directed Cablevision to pay back royalties for the entire period not excepted by the statute of limitations or only for the period after promulgation of the regulation—the period covered by the bonds the district court mentioned—we reverse the dismissal and remand for further proceedings on the counterclaim consistent with this opinion. The action is

Reversed in part and reversed and remanded in part.

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[25] "The words 'willful or repeated' are used to prevent a cable system from being subjected to severe penalties for innocent or casual acts . . . . The Committee does not intend . . . that a good faith error by the cable system in computing the amount due would subject it to full liability as an infringer." H.R. REP. NO. 94-1476, *supra*, at 93.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CABLEVISION COMPANY, *Plaintiff,* v. MOTION PICTURE ASSOCIATION OF AMERICA, INC., et al. *Defendants.*	Civil Action No. 83-1655
NATIONAL CABLE TELEVISION ASSOCIATION, INC., *Plaintiff,* v. COLUMBIA PICTURES INDUSTRIES, INC., et al. *Defendants.*	Civil Action No. 83-2785
CABLEVISION COMPANY *Plaintiff,* v. MOTION PICTURE ASSOCIATION, OF AMERICA, INC., et al., *Defendants.*	Civil Action No. 84-3097

OPINION

These matters are before the Court on cross-motions for summary judgment, the respective opposition and reply briefs to the motions, a hearing on the motions, and the entire record herein.

I. Background

This civil action consists of three separately filed complaints which seek a judicial interpretation of a phrase contained in Section 111(d) of the Copyright Act of 1976, Pub.L. No. 94-553, 90 Stat. 2541 (1978) (codified at 17 U.S.C. §§ 101 *et seq.*) Plaintiff Cablevision Company ("Cablevision") filed two of those complaints, Civil Action Nos. 83-1655 and 84-3097. Cablevision provides cable television services to subscribers residing in Nassau, Westchester, and Suffolk Counties, New York, and in Bayonne and Bergen Counties, New Jersey. Plaintiff National Cable Television Association, Inc. ("NCTA") filed the third complaint, Civil Action No. 83-2785. NCTA is a trade association whose members include owners and operators of cable television systems in the United States. Cablevision, a member of NCTA, is also a plaintiff-intervenor in the *NCTA* action. *See* March 20, 1984, Order granting Cablevision's Motion to Intervene.

The defendants are the same in all three cases. They include eight copyright owners, co-owners or exclusive licensees of public performance, distribution and rights to the motion pictures which are the subject of this dispute and a trade association which represents the interests of these copyright owners. These copyright owners are Columbia Pictures Industries, Inc., Embassy Communications, MGM/UA Entertainment Co., Orion Pictures Corporation, Paramount Pictures Corporation, Twentieth Century-Fox Film Corporation, Universal City Studios, Inc., Warner Bros. Inc., and the Motion Picture Association of America ("Copyright Owner Defendants"). The U.S. Copyright Office and its Register ("Copyright Office Defendants") were

joined as necessary party defendants in a separate count of an amended complaint pursuant to an order of this Court. *See* July 17, 1984, Order and Amended Complaint filed August 20, 1984. The Copyright Office is an office of the Library of Congress in Washington, D.C., which has certain responsibilities with respect to the Copyright Act of 1976 pursuant to that Act. The Register of Copyrights is the officer in charge of the Copyright Office.

Plaintiffs' complaints seek a declaratory judgment as to the proper interpretation of Section 111(d) of the Copyright Act of 1976, concerning the amount of gross receipts included in calculating the payment of copyright royalty fees by cable television systems for the basic service of providing secondary transmissions of primary broadcast transmitters. Both plaintiffs claim that the defendants interpret improperly section 111(d) so as to require cable operators to overpay substantially their copyright royalty fees and thereby unjustly enrich defendants. Moreover, Cablevision requests an order restraining Copyright Owner Defendants from instituting any further action against it for copyright infringement and such other relief as may be appropriate.

The defendants disagree with plaintiffs' reading of section 111(d). They argue instead that the plaintiffs' interpretation of the statute results in an underpayment of royalties. Defendant Copyright Owners filed a counterclaim for copyright infringement, statutory damages, injunctive relief, costs, and attorneys fees.

Before the Court discusses more fully the positions of the parties in this dispute, a short overview of section 111(d) and the development of the cable industry is in order.

A. The Copyright Revision Act of 1976

The Copyright Revision Act of 1976, 17 U.S.C. §§ 101 *et seq.*, established a compulsory copyright license for the

retransmission of television broadcast signals by cable systems. The Act was the culmination of congressional efforts to respond to the Supreme Court's decisions in *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968), and *Teleprompter Corp. v. CBS, Inc.*, 415 U.S. 394 (1974), which held that the distribution of television broadcasts was not a "performance" so as to be protected by the Copyright Act of 1909. Consequently, the cable operators were not required to make royalty payments to the copyright owners. The Court stated in *Teleprompter* that "any ultimate resolution of the many sensitive and important problems in this field . . . must be left to Congress." 415 U.S. at 414.

Congressional efforts to safeguard the interest of the creators of copyright material being distributed on cable systems, while still allowing for the fullest development of the public's right of access to information through cable technology, began in 1964 and was followed quickly by the introduction of bills in 1965, 1966, 1967, 1969, 1971, 1973, and 1975, leading to the passage of the revised Copyright Act of 1976. *See The Cable Television Provisions of the Revised Copyright Act*, 27 Cath.U.L.Rev. 263, 279 n.64 (1978). Congress realized that it would be impractical, if not impossible, for each and every cable operator to negotiate directly with every copyright owner and embarked upon a new approach.

This new approach required cable operators to obtain a compulsory license in order to retransmit television programs. Copyright owners of motion pictures and/or other works that are embodied in the retransmitted signals are compelled to license these works to cable systems in return for which they are compensated through the payment of semi-annual fees by individual cable systems. These semi-annual royalty fees are computed in accordance with a statutory formula based upon gross receipts from a basic statutory service.

The royalty schedule formula was the result of last-minute negotiations between the copyright owners and the cable television industry and, with some modifications, is found in section 111(d)(2)(B) which provides for the fee to be

> computed on the basis of specific percentages of the gross receipts from subscribers to the cable service during said period for the basic service of providing secondary transmission of primary broadcast transmitters. . . .

17 U.S.C. 111(d)(2)(B). The royalty fees are then distributed to those copyright owners whose works were the subject of secondary transmissions of broadcast signals. The Copyright Tribunal ("Tribunal"), an independent agency of the legislative branch, determines the formulae for dividing the fees among the copyright owners. The Tribunal is also authorized to ". . . adopt regulations . . . governing its procedures and methods of operation. . . ." 17 U.S.C. § 803.

Semi-annual statements of account which list the broadcast signals carried by the cable system operators must also be filed with the semi-annual royalty payments. Cable systems with semi-annual gross receipts below $146,000 pay a flat royalty fee ($28) regardless of the number of distant signals carried, and are known as "Form 1" systems. 17 U.S.C. § 111(d)(2)(C); 37 C.F.R. § 308.2(b)(1) (1985). Cable systems with semi-annual gross receipts of $146,000 to $292,000, commonly known as "Form 2" systems, pay a royalty fee based on a set percentage of gross receipts regardless of the number of distant signals. 17 U.S.C. § 111(d)(2)(D); 37 C.F.R. § 308.2(b)(2) (1985).

Major cable systems with semi-annual gross receipts in excess of $292,000, known as "Form 3" systems, pay royalty fees based on a percentage of gross receipts, but the percentage varies with the number and nature of the broadcast signals retransmitted. The licensing fee of the

major cable operators is based upon a percentage of gross receipts derived from basic subscriber charges multiplied by the number of distant signal equivalents ("DSE") carried. A DSE is a numerical value assigned to the secondary transmission of a non-network television program beyond the local service area of the primary transmitter by a cable system. 17 U.S.C § 111(f). Different DSE values are assigned to three types of stations (independent, network affiliated, and noncommercial educational) that can be retransmitted as distant signals.[1] *Id.* *See* Copyright Owner Defendants' Motion for Summary Judgment on Phase One Issue at 10-12, filed March 2, 1984, for a detailed explanation of Form 3 System royalty fee calculations.

Congress defined the terms "secondary transmissions" and "primary transmissions" used in section 111(d)(2)(B) of the Act.[2] It failed, however, to define specifically the terms "gross receipts" or "basic service," the meaning upon which this controversy centers. The Copyright Tribunal, consistent with its mandate and over six months after NCTA filed its complaint, adopted rules of procedure and prepared forms for the use of cable operators to fa-

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[1] A greater distant signal equivalent ("DSE") value is "assigned independent television stations since they almost exclusively carry nonnetwork programming; a lesser value is assigned to network affiliates since they carry only a limited amount of nonnetwork programming." National Cable TV v. Copyright Royalty Tribunal, 689 F.2d 1077, 1080 n.17 (D.C. Cir. 1982).

[2] A "primary transmission" is a transmission made to the public by the transmitting facility whose signals are being received and further transmitted by the secondary transmission service, regardless of where or when the performance or display was first transmitted.

> A "secondary transmission" is the further transmitting of a primary transmission simultaneously with the primary transmission, or nonsimultaneously with the primary transmission if by a "cable system" not located in whole or part within the boundary of the forty-eight contiguous States, Hawaii, or Puerto Rico. . . .

17 U.S.C. § 111(f).

cilitate the filing of periodic statements of account and defined specifically "gross receipts." According to the Tribunal,

> [g]ross receipts for the "basic service of providing secondary transmissions of primary broadcast transmitters" include the full amount of monthly (or other periodic) service fees for any and all services or tiers of service which include one or more secondary transmissions of television or radio broadcast signals, for additional set fees, and for converter fees. All such gross receipts shall be aggregated and the DSE calculations shall be made against the aggregated amount.

37 C.F.R. § 201.17(b)(1) (April 2, 1984).

B. The Development of the Cable Industry

When the 1976 Copyright Act was passed, cable television and ancillary technologies were still developing. Cable television developed originally as a means for transmitting television broadcast signals by wire to the homes of paying subscribers. These cable television systems retransmit both local broadcast signals, received off the air by antennae, and distant broadcast signals, customarily received by terrestrial microwave relay systems or by satellite. Cable television systems also transmit nonbroadcast entertainment and informational programing, *i.e.*, programing that is not originally broadcast by a television station. Such nonbroadcast transmissions are made under individually negotiated copyright licenses.

Early cable systems had limited channel capacity, usually twelve systems or less. The principal use of these channels was for retransmission of local broadcast signals received off the air at a well-placed antenna site and distant broadcast signals imported by microwave. The cable systems offered usually both the local and distant broadcast signals for a single package price. By the early 1970's, a few

cable systems began to offer one or more optional tiers of services for an additional charge. The optional tiers usually consisted of one or two channels of commercial-free movies, *i.e.*, Home Box Office ("HBO"), or other entertainment supplied to the cable system by tape or microwave.

A whole new category of nonbroadcast programing emerged as satellite and cable technology developed in the 1970's. This programing today consists of offerings such as ESPN (a sports channel), The Weather Channel, the Health Channel, cultural and religious channels, etc. According to NCTA, "some of these channels are supported principally by advertising" while "others are financed in substantial part by cable systems making direct payments to the supplier for the right to offer the copyrighted programing." NCTA Complaint at 11.

The cable system enters into a written agreement with the program supplier licensing the system to transmit the copyrighted nonbroadcast programing and governing the compensation, advertising rights, and other terms agreed to by the parties. Some cable systems offer the nonbroadcast channel as an optional tier of service at an additional charge. Other systems add the nonbroadcast programing with the system's so-called "basic service" or lowest tier of service and the combined tier is offered at a higher charge. As to the former type of "tiering," the additional tier will sometimes include retransmitted distant broadcast signals. For example, a typical additional tier may include one or more of the satellite delivered broadcast "superstations," *i.e.*, WTBS (Channel 17 in Atlanta) and one or more distant broadcast signals. The marketing practice of "tiering" has become prevalent in the cable industry and cable operators now frequently market their program services in "tiers" consisting of both broadcast and nonbroadcast programing. *See* 49 Fed. Reg. 13029, 13034 col. 3 (April 2, 1984).

C. Positions of the Parties

The Court notes with interest that plaintiffs Cablevision and NCTA see different interpretations of the phrase "gross receipts from subscribers to the cable service . . . for the basic service of providing secondary transmissions of primary broadcast transmitters" contained in section 111(d) of the Act. Cablevision has interpreted section 111(d)(2)(A) of the Act to require the computation of copyright royalty payments on the basis of the gross receipts paid by subscribers for Cablevision's Basic Service, the tier of service to which all of the subscribers must subscribe prior to receiving any additional tiers of service. Cablevision claims that when the Act was enacted in 1976, the term basic service had a recognized meaning within the cable television industry. "It was the lowest tier of service offered by a cable television system to which all subscribers were required to subscribe before they were permitted to subscribe to any additional tiers of service." Cablevision's Statement of Material Facts as to Which There is No Genuine Issue ¶ 10. Cablevision also asserts that the term " 'basic service' was synonymous with and used interchangeably by the industry with such terms as 'minimum level of service,' 'initial package,' and 'regular subscriber service.' " *Id.* Cablevision's interpretation would exclude from royalty calculations all revenue attributable to an optional tier, whether or not that tier contained distant broadcast programing.

NCTA, on the other hand, argues "that Section 111 of the Act requires the payment of compulsory royalties only for secondary transmissions of primary broadcast transmitters and not for transmissions of other, nonbroadcast programing. . . ."[3] Memorandum of Points and Authorities

[3] NCTA also challenges the meaning of the term "cable system " as defined in Section 111(f), Title 17, United States Code. Because the Court finds that this issue relates to the definition of a cable system, *see* 17 U.S.C. § 111(f), an issue not presently before the Court, it will not be addressed.

in Support of NCTA's Renewed Motion and Cross-Motion for Summary Judgment and in Opposition to the Copyright Owners' and Copyright Office's Motions for Summary Judgment ("NCTA's Motion for Summary Judgment"), at 19. According to NCTA, such an interpretation would avoid double payment by cable systems for nonbroadcast programing for which negotiated copyright royalties or other forms of compensation have already been paid separately.

The Copyright Owner Defendants take the position that "plaintiff's [Cablevision] private definition of 'basic service' is contrary to section 111's intent and purpose which requires gross receipts from all retransmission services on which any distant or local broadcast signal is provided by the system." Copyright Owner Defendants' Opposition to Plaintiff's Motion for Summary Judgment and Reply in Support of their Motion for Summary Judgment in No. 83-1655 ("Copyright Owner Defendants Opposition") at 10-11. The Copyright Owner Defendants also assert that plaintiff's definition uses terms that were not commonly used in the cable industry in the period 1970-76 and is not the definition used by Congress, the FCC, the franchising authorities with whom plaintiff dealt, or even by the plaintiff. *Id.* at 28. They insist that Cablevision's definition relates to marketing practices alone and not to areas of either congressional or FCC concern.

The Copyright Office Defendants support the arguments made by the Copyright Owner Defendants. Moreover, the Copyright Office argues that its published interpretation of section 111 is entitled to substantial deference by the Court given its expertise in copyright law and therefore should not be overturned since it is not arbitrary, capricious or otherwise not in accordance with law. As to NCTA's allocation of receipts argument, the Copyright Office contends that "[t]here is simply no provision in the copyright law for the allocation of gross receipts for the actual reception by subscribers of each individual copyrighted work." Federal Defendants' Opposition to

Plaintiff's Cross-Motions for Summary Judgment at 18. They assert that "[a] licensing system that would permit every cable operator to account for the retransmission of each broadcast signal containing a copyrighted program would be unworkable within the statutory scheme set by Congress." *Id.* at 17-18.

II. Discussion

A. Standard of Review

It is a well-settled principle that "the construction put on a statute by the agency charged with administering it is entitled to deference by the courts, and ordinarily that construction will be affirmed if it has a 'reasonable basis in law.' " *Volkswagenwerk v. FMC*, 390 U.S. 261, 272 (1968) (citing *NLRB v. Hearst Publications*, 322 U.S. 111, 131 (1959)). "Nevertheless, while informed judicial determination is dependent upon enlightenment gained from administrative experience," *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965), the courts are the final authorities on issues of statutory construction. Judicial deference cannot be blind or absolute and courts "are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *Volkswagenwerk v. FMC*, 390 U.S. at 272 (citing *NLRB v. Brown*, 380 U.S. 278, 291 (1965)). *See also Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 97 (1983).

The Supreme Court recently reinforced the concept of judicial deference to an expert agency's statutory interpretation in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). In *Chevron*, the court held that "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." 467

U.S. at 844 (footnote omitted). The Court further stated that

> the principle of deference to administrative interpretations "has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations."

Id. (citations omitted).

Under the *Chevron* view, a court's first task when reviewing an agency's construction of the statute which it administers is to determine whether Congress has directly spoken to the precise question at issue. If Congress has not, "the Court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather . . . the question is whether the agency's answer is based on a permissible construction of this statute." 467 U.S. at 842-43 (footnote omitted). *See also Am. Fed. of Gov. Employees v. FLRA*, 778 F.2d 850, 856 (D.C. Cir. 1985).

B. Statutory Language

The statutory language of section 111(d) that this controversy centers around is the phrase "*gross receipts* from subscribers to the cable service during said period for the *basic service* of providing secondary transmissions of primary broadcast transmitters. . . ." 17 U.S.C. § 111(d)(2)(B) (emphasis added). As noted previously, Congress failed to define the terms "gross receipts" and "basic service," two terms whose definitions affect greatly the calculation of royalty fees due to copyright owners under the compulsory licensing scheme embodied in section 111(d). The Copyright Office, however, subsequently defined "gross receipts" in

the context of the statute so as to "include the full amount of monthly (or other periodic) service fees *for any and all services or tiers of service* which include one or more secondary transmissions [local or distant] of television or radio broadcast signals, for additional set fees, and for converter fees." 37 C.F.R. § 201.17(b)(1) (1984). It is this interpretation that both plaintiffs challenge for reasons already cited.

Based on an examination of the legislation and its history, the Court finds that the Copyright Office's definition of "gross receipts" does not have a reasonable basis in law and frustrates the underlying congressional policy.

The Copyright Office Defendants take the position that,

> [w]here broadcast signals subject to compulsory licensing under section 111 are offered *in combination with* nonbroadcast services such as HBO, as a package, the revenues from both tiers must be combined for reporting purposes. . . . The requirement is clear. *Whenever the two types of service are offered for a single price or, if on separate tiers, whenever it is necessary to subscribe to one tier in order to receive another*, the two services are in reality being offered as a single package of service; if secondary transmissions are included in the package, gross receipts from both tiers or the combined package must be reported and used in calculating copyright royalties.

Letter from Dorothy Schrader, Copyright Office General Counsel, filed June 20, 1986 ("Schrader Letter") at 1 (emphasis in original).

Under the present definition of "gross receipts," cable system operators like plaintiff Cablevision are forced to pay royalties on nonbroadcast signals for which they have already paid simply because these signals are contained in a tier of service with a secondary transmission signal. This

seems unfair to the Court. For example, all parties concede that if an operator markets all his broadcast channels (local and distant signals) in one tier for $10 and separately offers HBO or another movie service for $9, the compulsory royalty fee would be calculated on a $10 base. NCTA's Motion for Summary Judgment at 24-25 (citing Copyright Owner Defendants' Response to Plaintiff [NCTA's] Request for Admission 17). However, if that same operator combines services so that the only available package includes the broadcast channels and the movie channel for $19, under the present definition of "gross receipts" all $19 must be used to compute the broadcast royalty fee. *Id.* Surely, Congress did not intend such an anomalous result.

Congress established the compulsory license fee in the Copyright Act to "compensate the owners of syndicated programming initially broadcast in communities remote from the cable system." *National Cable TV v. Copyright Royalty Tribunal*, 689 F.2d 1077, 1079 (D.C. Cir. 1982). As explained by the Court of Appeals in that case,

> [t]he Act's compulsory license enables cable systems to offer subscribers essentially three types of "basic" service: (a) signals of local stations that are otherwise poorly received, (b) national programming from affiliates of the three commercial networks, regardless of the location of the broadcast station, and (c) non-network or "syndicated," programming originating in a community distant from the cable system. As a result of secondary transmissions, advertisers supporting the first two types of programming reach a larger portion of their intended audience (local and national, respectively). Thus, cable carriage permits the originating station to raise its advertising rates and thereby increase its payments to program producers. The market does not, however, as naturally compensate the owners of syn-

> dicated programming initially broadcast in communities remote from the cable system. Such programming is generally sponsored by local advertisers with little or no interest in the distant cable audience.
>
> Consequently, the Copyright Act requires cable operators to pay royalties as a function of the "distant signal equivalents" (DSEs) they carry. Since it would be impractical for each operator to pay the copyright owners of syndicated programming directly, the Act obliges the operators to pay fees into a royalty pool controlled by the Tribunal which, in turn, determines the appropriate share for different types of copyright owners. The fees are calculated as a percentage of gross receipts from basic subscriber charges, varying according to the number of DSEs carried.

Id. at 1079-80 (footnotes omitted).

Given the rational behind the compulsory license system, the Court finds that Congress did not intend to include revenues from nonbroadcast programing in the calculation of "gross receipts." The congressional reports accompanying the legislation stated that "copyright liability of cable television systems under the compulsory license should be limited to the retransmission of distant non-network programing." H.R. Rep. No. 1476, 94th Cong., 2d Sess. (1976) at 90. Furthermore, the report states that "[f]or the purpose of computing royalty payments, only receipts for the basic service of providing secondary transmissions of primary broadcast transmitters are to be considered. Other receipts from subscribers, such as those for pay-cable services . . . are not included in gross receipts." *Id.* at 96. This language makes clear Congress' intent to exclude revenues attributable to nonbroadcast signals from the calculations of "gross receipts" under section 111(d).

All parties to this controversy would without a doubt agree with this conclusion.

The real point of contention is the Copyright Office Defendants' definition of "gross receipts" which includes revenues from nonbroadcast signals when these signals are offered in combination with broadcast signals subject to compulsory licensing under section 111. According to the Copyright Office, "[*w*]*henever the two types of service are offered for a single price or, if on separate tiers, whenever it is necessary to subscribe to one tier in order to receive another*, the two services are in reality being offered as a single package of service . . . " and "gross receipts from both tiers or the combined package must be reported and used in calculating copyright royalties." Schrader Letter at 2. NCTA argues that this method of calculating gross receipts results in an inequitable double payment and thus is an unreasonable interpretation of the statute. The Court agrees.

Nonbroadcast signals are obtained by cable operators through privately negotiated contracts which compensate fully the copyright owners for such programing. The definition of "gross receipts" promoted by the defendants results in a "double payment" to the copyright owners since they would receive payment directly from the cable operator pursuant to a contract and again from the Copyright Royalty Tribunal. The Court finds that the mere inclusion of nonbroadcast signals on the same tier with broadcast signals does not magically transform the nonbroadcast signals into signals now subject to the compulsory licensing scheme. They remain outside the licensing scheme and any revenues attributable to them should not be included in the calculation of "gross receipts." A contrary conclusion would contravene the congressional intent to limit royalty payments under the Act to distant nonnetwork programing.

Next the Court must define the term "basic service." Cablevision defines this term as the lowest tier of service offered by a cable television system to which all subscribers are required to subscribe before they can subscribe to any additional tiers of service. Cablevision's interpretation of section 111 excludes revenues from any optional tier of service, whether or not it contains distant signals. Cablevision also contends that "basic service" is synonymous with the Federal Communications Commission ("FCC") terminology such as "minimum level of service," "initial package," and "regular subscriber service." The Copyright Owner Defendants disagree with Cablevision's definition and assert instead that plaintiff's private marketing definition of "basic service" bears no relationship to the statutory definition intended by Congress. Moreover, the Copyright Owner Defendants argue that section 111 requires the reporting of *all* revenues attributable to both local and distant signals. The Court agrees with the Copyright Owner Defendants.

First, the Court dismisses Cablevision's assertion concerning the synonymous meaning of the term "basic service" with supposedly similar terms used by the FCC. The Court finds that the FCC terms are to be construed independent of and differently from those used in section 111 of the Copyright Act. The FCC and the Copyright Office are federal agencies charged with different areas of responsibility and focus. Terms which appear to mean the same standing alone may, when placed in their proper contest, hold a very different meaning. For this reason, the Court will consider this particular contention of Cablevision no further.

Second, the Court finds that the term "basic service" has already been defined by the U.S. Court of Appeals for the District of Columbia in *National Cable TV v. Copyright Royalty Tribunal*. In *National Cable TV*, the Court defined "basic service" to include the following secondary transmissions: (a) local signals, (b) national network signals, and (c) distant signals. 689 F.2d 1079. Although the

Court in that case did not have the precise issue of the statutory definition of "basic service" before it, this fact in no way diminishes the weight to be given to that Court's definition. Accordingly, the Court finds that it is bound by the definition given to the term "basic service" by the highest court in this Circuit and hereby incorporates that definition into this opinion.

In light of this definition, the Court holds further that the calculation of "gross receipts from subscribers to the cable service . . . for the basic service of providing secondary transmissions . . .", 17 U.S.C. § 111(d)(2)(B), should include all revenues produced by the retransmission of *local and distant signals* no matter what tier of service the signal is included. Like nonbroadcast signals, signals designated as being a part of a cable system's "basic service" do not lose that designation simply by being placed on a higher tier or on a mixed tier. A different conclusion would subvert Congress' express intention of providing compensation to copyright owners of retransmitted distant signals through implementation of the compulsory license statutory scheme.

As noted in the congressional records on section 111,

> [the] retransmission of distant non-network programing by cable systems causes damage to the copyright owner by distributing the program in an area beyond which it has been licensed. Such retransmission adversely affects the ability of the copyright owner to exploit the work in the distant market. It is also of direct benefit to the cable system by enhancing its ability to attract subscribers and increase revenues. For these reasons, the Committee [on the Judiciary] has concluded that the copyright liability of cable television systems under the compulsory license should be limited to the retransmission of distant non-network programing [distant signals].

H.R. Rep. No. 1476, 94th Cong., 2d Sess. (1976) at 90.

If the Court were to rule in a manner so as to limit the calculation of "gross receipts" to include only the revenues attributable to signals contained on the lowest or first tier of service, cable operators like Cablevision would be free to tailor their marketing practice in such a way as to lower their royalty payments at the expense of the copyright owners. Under the method of calculation suggested by the Court today, the cable operators are asked to do nothing more than Congress intended — compensate the copyright owners for the retransmission of distant signals.

III. Conclusion

The Court concludes that any calculation of gross receipts under section 111(d) of the Copyright Act of 1976 must include the revenues from both local and distant signals notwithstanding their tier placement. Any revenues attributable to nonbroadcast signals are excluded from this calculation. The Court holds that this conforms to the phrase "gross receipts from subscribers to the cable service during said period for the basic service of providing secondary transmissions of primary broadcast transmitters. . . ." 17 U.S.C. § 111(d)(2)(B). The Court, therefore, orders the Copyright Office and its Register to amend their definition of "gross receipts" contained in 37 C.F.R. § 201.17(b)(1).

The Copyright Royalty Tribunal shall recalculate the amount of royalty payments owed by plaintiff Cablevision based on this holding of the Court. It is beyond the province of the Court to dictate the specific method of calculating the royalties to be paid by Cablevision. In the instance where local or distant signals are offered in a combination package with other signals at a discount price, the amount to be used in calculating the gross receipts of that package must represent the price of the distant signal

before the discount is taken. For instance, if a cable system provides superstations WTBS and WOR-TV (distant signals) on Tier I for $2, CNN and ESPN (nonbroadcast signals) on Tier II for $2, or both tiers together in a package for $3, the Copyright Royalty Tribunal should use $2 out of the $3 discount price for the combined package in calculating the broadcast retransmission royalty so that the copyright owners are not penalized when "bargain" combinations are made.

Finally, the Court dismisses the counterclaims for statutory damages, as specified in 17 U.S.C., §§ 504(c)(1) and (2), for copyright infringement, injunctive relief, costs, and attorneys fees. The counterclaims allege that Cablevision's failure to file true and complete statement of accounts and to pay the royalty fees provided in 17 U.S.C. § 111(d) which are prerequisites for obtaining compulsory licenses while retransmitting their copyrighted works constitutes copyright infringement. The Court cannot agree with defendants.

The Court finds that while Cablevision did not comply with the letter of the copyright law as interpreted by the Copyright Office and its Register during the relevant period, it did comply with the spirit of the law. After all, not only did Cablevision remit checks totaling over $800,000 to cover royalty payments based on its narrow interpretation, but it also posted a nearly $2 million surety bond to cover the difference between that amount and the amount the Copyright Office claimed was due. These are not the acts of a copyright infringer. Accordingly, the only recovery due to the Copyright Owner Defendants is that provided in section 111(d)(2)(B) of the Copyright Act—royalty payments.

An appropriate order is attached.